No. 7466.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Alfred G. Wilkes, E. Byron Siens, John McKeon, Robert McKeon, Maurice C. Myers, William J. Cavanaugh, Fred Shingle and Horace J. Brown,

Appellants,

vs.

United States of America,

Appellee.

BRIEF OF APPELLANTS FRED SHINGLE AND HORACE J. BROWN.

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BRIEF OF APPELLANTS FRED SHINGLE AND HORACE J. BROWN.

STATEMENT OF THE CASE.

Appellants, Fred Shingle and Horace J. Brown, were indicted with sixteen other persons, charged in the first fourteen counts of the indictment with the devising of a scheme and artifice to defraud and the purported use of the United States Mails for the purpose of executing such scheme in violation of Federal Penal Code Section 215 (18 U. S. C. A. 338); the fifteenth count charged a purported conspiracy "to conspire" to do the things alleged

in the first fourteen counts. The alleged scheme to defraud was pleaded in the first count of the indictment and incorporated by reference in the remaining counts. [R. 26-27.]

These appellants seasonably interposed a demurrer, both general and special, which was overruled, and a motion for a bill of particulars [R. 137-149 *et seq.*] which was granted in part and denied in part. Exceptions were noted to the adverse rulings. [R. 79 and 80.]

After entry of pleas of not guilty these appellants moved for a separate trial which was denied and exception noted. [R. 161-165.] Appellants Shingle and Brown joined in an affidavit of personal bias and prejudice of the trial judge, Honorable George Cosgrave, executed by the defendant Siens, which affidavit was overruled and denied and exception noted. [R. 166-188.]

Seventeen defendants were placed on trial, the eighteenth, R. L. Mikel, having been granted a separate trial. At the conclusion of the government's case in chief the cause was, on motion of government counsel, dismissed as to the defendants DeMaria and Lyons. [R. 686.] Appellants thereupon moved the court (1) to strike certain evidence from the record and instruct the jury to disregard it, (2) to limit certain evidence to certain defendants and instruct the jury not to consider such evidence as to other defendants, (3) to instruct the jury to return verdicts of not guilty as to each appellant as to each count for insufficiency of the evidence. [R. 681-692.] All motions

were denied and exceptions noted [R. 689 and 692] except that counts numbered one, four, five, nine and ten were dismissed for insufficient evidence and the motion for an instructed verdict granted as to the defendant Tommassini.

At the conclusion of all evidence appellants renewed the motions made at the conclusion of the government's case to strike and limit evidence and for instructed verdicts of not guilty. The motions were denied and exceptions noted. [R. 1261-1262.] The cause was submitted to the jury which, after deliberating from Thursday noon until late Sunday morning, returned its verdict finding appellants Shingle and Brown guilty on count twelve of the indictment and not guilty on all other charges. No other defendant was found guilty on count twelve. [R. 124 and 125.]

Appellants' respective motions for a new trial and in arrest of judgment were denied [R. 1359 to 1363] and they were each sentenced to serve one year in jail and fined $1000 each. From the verdict and judgment and other proceedings above stated these appeals are prosecuted.

To simplify this appeal a joint record has been filed on behalf of all appellants. In the brief of appellants McKeon is contained an analysis of the indictment and evidence which these appellants adopt. We shall only include herein such matters as are not covered in the McKeon brief and which apply to these appellants whose situation is dissimilar to that of other appellants and who were acquitted on all of the counts upon which any other appellant was convicted.

THE INDICTMENT AND BILL OF PARTICULARS.

The alleged scheme to defraud is pleaded in the first count of the indictment and incorporated by reference in the remaining counts. The scheme is divided into a number of "parts," the indictment alleging that "some of the defendants" participated in some "parts" and that "these said defendants" and "the defendants" participated in other parts. Because of the uncertainty existing as to which defendants were meant by this peculiar terminology, Judge Paul J. McCormick, before whom the case was pending before trial, granted appellants' motion and required that a bill of particulars be furnished advising appellants which of the defendants the government claimed had participated in these various "parts" of the alleged scheme.

The bill of particulars as furnished simply referred to the terminology as it appeared by page and line in the typewritten indictment. In the printed record we have printed this terminology in bold face type specifying by footnote references the page and line reference in the original indictment. [R. 29-37.] It is an arduous, painstaking and time consuming task to thumb through the record and insert in the appropriate places the names of those defendants and appellants alleged in the bill of particulars to have participated in the various "parts" of the alleged scheme and to enumerate those excluded from participation in these various "parts." To simplify this task we will divide the "parts" of the alleged scheme into four, viz: (1) the $80,000 loan syndicate, (2) the purchase of the Brownmoor assets by the Italo Petroleum Corporation of America for 600,000 units of Italo stock,

(3) the $3,500,000 or "Big Syndicate," (4) the purchase of the assets of the McKeon Drilling Company, Inc., by the Italo Petroleum Corporation of America for a cash and stock consideration. We will designate those "parts" in which the bill of particulars alleges these two appellants, Shingle and Brown, participated and those in which the bill of particulars does not specify them as having participated and will give references to the appropriate record references substantiating the statements made.

Preliminarily an important undisputed fact should be stated and kept constantly in mind by the court, and that is, that the appellants Shingle and Brown were never officers or directors of Italo-American Petroleum Corporation (herein referred to as Italo-American) *or of Italo Petroleum Corporation of America* (herein referred to as Italo) *or of the Brownmoor Oil Company* (herein referred to as Brownmoor) *or of the McKeon Drilling Co., Inc.* (herein referred to as McKeon Company).

The Indictment as Restricted by the Bill of Particulars Alleges:

1. $80,000 Loan Syndicate.

That about May 16, 1928, certain defendants, *including Shingle and Brown* [Indictment p. 3, lines 19 and 20, R. p. 29; Foot Note 2, Bill of Particulars, par. 4-a and b, R. p. 154], loaned Italo $80,000 for which they "wrongfully" received as a bonus 80,000 shares of Brownmoor stock.

2. Brownmoor-Italo Transaction.

That the defendants who were officers and directors of Italo, *excluding Shingle and Brown* [Indictment, R. p. 30; F. N. 6 and 7, B. P. par. 4-c and d, R. p. 154], caused Italo to contract to purchase the Brownmoor assets at an excessive consideration and caused Italo to issue 600,000 units of its stock as part of the purchase price therefor. That "these defendants" including Shingle and Brown "wrongfully" received part of this 600,000 units of stock and "unlawfully" received part of the proceeds therefrom.

3. That defendants, *excluding Shingle and Brown* [Ind. p. 4, lines 26 and 27, R. p. 31; F. N. 15, B. P. par. 4-h, R. p. 155], applied to and received from the Corporation Commissioner of the State of California, on or about May 16, 1928, a permit authorizing Italo to issue to Brownmoor 600,000 units of Italo stock for the Brownmoor assets, and that these same defendants issued this stock to the Brownmoor on June 1, 1928. That a permit was applied for (by the Brownmoor Company) to distribute this 600,000 units of stock to the Brownmoor stockholders but the permit authorized distribution of only 575,000 units, but the total 600,000 units was distributed before this permit was received. *It is not claimed that Shingle or Brown participated in the proceedings before the Corporation Commissioner,* but they are included among those who are alleged to have received some of this stock, it being alleged that they were not Brownmoor stockholders. [Ind. p. 9, lines 29 and 30, R. p. 32; B. P. par. 4-j, R. pp. 155 and 156.]

4. The Big Syndicate.

That certain defendants, *including Shingle and Brown,* formed and became members of a syndicate; that some of the defendants, *other than Shingle and Brown* [Ind. p. 6, R. 33; F. N. 22, B. P. par. L-2, R. p. 156], while officers and directors of Italo caused Italo to issue 6,000,000 shares (3,000,000 units) of its stock to the Syndicate for $3,500,000, and that the defendant Syndicate members, *including Shingle and Brown,* should "wrongfully" receive profits as members of the Syndicate.

In his closing argument to the jury, Assistant Attorney General Wharton admitted that there was no fraud in the $80,000 Loan Syndicate, nor in the Brownmoor transaction, nor in the Big Syndicate. He rested his plea for conviction on the purchase by Italo of the McKeon Company assets. This concession does not appear in the record because it is not properly a part thereof, but such was the concession and we do not believe it will be seriously disputed, because the concession is in accord with the evidence as will appear. We shall, therefore, point out that appellants Shingle and Brown were not charged in the indictment or bill of particulars with having participated in the transactions whereby Italo acquired the McKeon Company assets, or in the alleged secret arrangement and agreement with respect thereto, or the receipt of the so-called "secret profits" alleged to be involved therein.

5. Purchase of McKeon Company Assets by Italo.

That "some of the defendants," *excluding Shingle and Brown* [Ind. p. 6, line 23, R. 34; F. N. 27, B. P. par. L-3, R. 156], while dominating and controlling Italo, and while its officers and directors, on or about July 5, 1928, caused Italo to contract with the McKeon Company to purchase the McKeon Company's assets "at a consideration far in excess of the actual value of said assets" and to issue and deliver 4,500,000 Italo shares as a part of the consideration. The bill of particulars specifies the defendants Masoni, Perata, Tommasini, DeMaria, Howard Shores, Siens, Robert S. McKeon, Westbrook and Wilkes, as those defendants who participated in this transaction. [Ind. p. 6, line 23, R. 34; F. N. 27, B. P. par. L-2 and 3, R. 156.]

6. That eight of these nine officers and directors (Tommasini omitted), *Shingle and Brown being excluded,* had a "secret arrangement and agreement," *that these same eight defendants* [Ind. R. p. 34; F. N. 31, B. P. L-4, R. 156-157] would receive back from McKeon Company 2,500,000 of the 4,500,000 shares without giving consideration therefor other than causing Italo to make the purchase contract.

7. That the defendants [Ind. p. 7, lines 19 and 20, R. p. 34; F. N. 36 described in B. P. par. O-3 and L-4, R. 156-157, as the same above-named eight defendants, *but excluding Shingle and Brown*] sold some of this stock received by them under the aforesaid secret arrangement

and agreement and converted the proceeds thereof to their own use and benefit.

8. That the same eight defendants, *excluding Shingle and Brown* [Ind. p. 7, lines 26 and 27, R. p. 35; F. N. 38, B. P. par. L-5, R. p. 157], represented in an application to the Corporation Commissioner for a permit for Italo to issue the 4,500,000 shares to the McKeon Company, that the McKeon Company was to receive 4,500,000 shares when they in fact knew that the McKeon Company would only receive 2,000,000 shares and that they were to receive the remaining 2,500,000 shares.

It will be observed that neither Shingle nor Brown is alleged to have had knowledge of or to have participated in any of these transactions respecting the acquisition of the McKeon Drilling Company's assets, or the secret arrangement and agreement with respect to the stock, or the sale of the said stock, or the receiving of any proceeds from the sale thereof. We have carefully set these matters forth for the benefit of the court because of our contention that the court erred in admitting evidence against these appellants over their objections that they were not charged therewith in the indictment and bill of particulars.

The remaining allegations of the indictment respecting the payment of dividends by Italo-American and alleged misrepresentations will not be referred to because we are not connected in the evidence therewith and they are sufficiently described in the McKeon brief.

STATEMENT OF FACTS AS DISCLOSED BY EVIDENCE.

As already stated, the McKeon brief summarizes the evidence with respect to the acquisition of the various oil properties. The appellants Shingle and Brown were not officers, directors or fiduciaries of any of the corporations involved in those transactions, and we shall only amplify the McKeon statement insofar as it is necessary to avoid confusion and to properly present the situation of these appellants as shown by the evidence.

Antecedents of Fred Shingle and Horace J. Brown.

Fred Shingle, 46 years of age, was born in Cheyenne, Wyoming, and has a wife and two daughters. [R. 882-883.] Upon his graduation from the University of California he worked in San Francisco with E. H. Rollins & Sons, a bond house, in positions ranging from office boy to city salesman, thereafter was employed in the Bond Department of the Savings Union Bank & Trust Company, looked after the interests of his brother Bob Shingle and his associates in the United Western Consolidated Oil Company, and in 1919 established an investment business which in August, 1919, became Shingle, Brown & Co., and with which the defendants Brown, Jones and Mikel became connected. The firm dealt almost exclusively in bonds until 1926 when it joined the San Francisco Stock Exchange and did a general brokerage business as well.

Horace J. Brown, 50 years of age, has resided in California since 1887. He was educated in the primary and high schools in San Diego, and then became a newspaperman with the San Diego Sun, edited newspapers in

Fresno and in Sacramento and was editor of the San Francisco News from 1909 to 1914. He became the First Chief Deputy Commissioner of Corporations under Commissioner H. L. Carnahan, became manager of the Marchant Calculating Co. in Oakland, and thereafter joined Fred Shingle in the formation of Shingle, Brown & Co. He is married and has two children.

That appellants Shingle and Brown were and are men of excellent reputations and clean business antecedents is clearly shown by the record. Their excellent reputations for truth, honesty and integrity in San Francisco where they resided and conducted their business was attested by the following witnesses:

The late George Presley, manager of the San Francisco Chamber of Commerce, and a member of the legal firm of Thomas, Beedy & Presley.

James K. Lockhead, Executive Vice President of the American Trust Co. of San Francisco.

Edwin M. Daugherty, Commissioner of Corporations of the State of California.

Hartley F. Peart, prominent attorney of San Francisco.

Walter Hood, member of the firm of Hood and Strong, certified public accountants of San Francisco.

Bradford M. Melvin, member of the firm of Gregory, Hunt & Melvin, attorneys, San Francisco.

Howard G. Tallerday, President Western Pipe & Steel Co. of San Francisco. [R. pp. 867-872.]

It affirmatively appears from the evidence that neither Shingle nor Brown was at any time an officer, director or fiduciary of either of the Italo corporations, nor of any of the other corporations mentioned in the evidence as engaged in the oil business. Neither of them had anything whatsoever to do with the negotiations for the purchase of any of the properties acquired by Italo, neither of them at any time exercised any domination or control over Italo or the other corporations, or the officers or directors thereof, and neither of them at any time had access to or knowledge of the contents of the books or records of these corporations. They were members of an independent financial concern which dealt at arm's length, fully, fairly and above board, and fully performed its obligations in a fair and legal manner.

Although Shingle, Brown & Co. had wound up its business about December 31, 1930, prior to the indictment herein, it had preserved all of its books and records concerning its business transactions. That the appellants had no knowledge of or consciousness of any wrongdoing or guilt is demonstrated by the fact that the auditor of Shingle, Brown & Co. was instructed by appellants to cooperate with the government postoffice inspector in every way as shown by the testimony of the witness Byers [R. p. 466]:

> "When the postoffice inspectors called on Shingle, Jones and Brown relative to getting access to their books and records, I was instructed by Shingle, Brown and Jones that they had absolutely nothing to conceal in those various books and records they had, and instructed me to give the postoffice inspectors full and complete access to them and assist them in any manner I could, which I did."

Shingle and Brown Not Connected With Italo-American or Early Activities of Italo-Pete.

The history and activities of Italo-American and Italo are adequately recited in the McKeon brief, pages 17 to 26. Since it is conceded that neither Shingle nor Brown were officers or directors or fiscal agents of either corporation, and that they had no dealings with Italo prior to the $80,000 loan in May, 1928, we shall simply refer the court to the records substantiating these statements. [Testimony of Courtney Moore, R. p. 197, and Stipulation, R. pp. 230-231.]

Evidence Respecting $80,000 Loan and Purchase of Brownmoor Assets by Italo.

The evidence respecting the negotiations for and acquisition of the Brownmoor properties is summarized in the McKeon brief, pages 26 to 31, and is hereby adopted.

While it affirmatively appears from the record that Shingle and Brown were not officers, directors, agents or fiduciaries of either Italo or Brownmoor and had nothing whatsoever to do with the negotiations leading to the purchase of the Brownmoor assets by Italo at a consideration alleged in the indictment to have been "far in excess of its actual value" and had little familiarity with the purchase transaction, it is appropriate to call the attention of the court to the appraisals of the Kern River Front property acquired by Italo from Brownmoor. The report of Dr. Eric A. Starke, a reputable and recognized petroleum and geological engineer, places a value of $4,225,-835.00 on this property, which was accepted by the corpo-

ration commission [Exhibit 25, R. pp. 795-6], while the report of D. R. Thompson, a reputable petroleum engineer [Exhibit J-b, R. p. 705], places a valuation of $2,984,000.00 This property and a small refining plant were acquired from Brownmoor by Italo for 600,000 units of Italo, having a value to Italo on the basis of $1.50 per unit less 15% commission (the price at which Italo was currently selling its stock to its fiscal agent Frederic Vincent & Co.) of $765,000.00. To this purchase price should be added $100,000 of Brownmoor indebtedness assumed by Italo in the transaction.

Frederic Vincent and George Stratton, partners of Frederic Vincent & Co., had knowledge of the negotiations pending between Italo and Brownmoor for the acquisition of the Brownmoor assets. They were fiscal agents of Italo and thereupon proceeded to acquire options on and purchase Brownmoor stock as early as March, 1928. [R. p. 393.] Negotiations between Wilkes, representing Italo, and Siens, representing Brownmoor, resulted in late April, 1928, in an agreed purchase price of 600,000 units of Italo stock for the Brownmoor assets, (600,000 shares of preferred and 600,000 shares of common) and the assumption by Italo of $100,000 of Brownmoor indebtedness. Italo was not then financially prepared to close the deal, and despite the importunities of Vincent and Stratton, Wilkes refused to execute the contract for Italo unless Italo could raise between $80,000 and $100,000 to take care of its obligations and carry on drilling operations. [R. p. 706.] That Italo's cash situation was poor at that time is shown by the evidence of the auditor, L. J. Byers, who testified that its books showed only $53.24 in the bank May 1, 1928, which was thereafter

followed by overdrafts through May 11, 1928, amounting to a maximum overdraft of $20,845.39. [R. p. 951.]

Thereupon Wilkes and Vincent who had no previous dealings with Shingle and Brown with respect to Italo approached them to assist Vincent & Company in financing Italo. Shingle [R. p. 884] and Brown [R. p. 963] declined to become interested in selling Italo stock, stating that they were engaged only in underwriting securities of established and stabilized businesses and not initial financing of oil companies or other ventures.

A few days later Wilkes and Vincent proposed to Shingle and Brown that they loan Italo $80,000, Vincent offering as an inducement 80,000 shares of Brownmoor stock owned by him to be given to the lenders of the money as part consideration for the loan, *and he further assured Shingle and Brown that as the holder of options on Brownmoor stock he would give Shingle and Brown a share of the profits which he expected to realize therefrom.* These facts appear from the evidence of Shingle [R. p. 885], of Brown [R. pp. 964-966] and Wilkes [R. pp. 742-743], and was not disputed by Vincent. [R. pp. 442-443.]

Security was offered as collateral for the loan, the adequacy of which was investigated and found to be sufficient, and thereupon Shingle and Brown agreed to make the $80,000 loan and to form a syndicate for that purpose. Shingle became trustee for the syndicate and subscribed $5,000 thereto. Some of the persons associated with Italo subscribed to the syndicate voluntarily. The agreement with Italo [Exhibit 238, R. p. 467] provided for the repayment of the loan in four equal quarterly instalments with interest at the rate of 7% per annum, and pledged

as security certain properties of Italo. The time of payment was so arranged because it was anticipated that the notes would be met through stock sales by Frederic Vincent & Co., whose contract called for minimum returns to Italo of $15,000 per month. The agreement between the syndicate members [Exhibit 142, R. p. 383] recited that the purpose of the syndicate was to lend $80,000 to Italo and that it being to the interest of "certain individuals" that Italo obtain such loan, such individuals were contributing 80,000 shares of Brownmoor stock as part of the consideration therefor, such stock to be distributed ratably to the members of the syndicate, but that if the Brownmoor stock was exchanged for Italo stock that 40,000 units of Italo stock would be issued in lieu of the 80,000 shares of Brownmoor stock.

Brownmoor Purchase.

The 80,000 shares of Brownmoor stock was deposited with Shingle a few days prior to making the loan as collateral security for a $10,000 loan, to which Shingle advanced $5,000 and Frederic Vincent & Co. $5,000 to enable Wilkes to close an oil lease at Cat Canyon concerning which testimony was given by Shingle [R. pp. 888-889], Brown [R. pp. 966-967] and Wilkes [R. p. 746]. Government witness Stratton in his testimony confirmed the fact that the 80,000 shares was first held at Vincent & Co.'s office. With the release of the collateral in this transaction the 80,000 shares of Brownmoor were held by Shingle for the benefit of the $80,000 loan syndicate.

With the announcement of the acquisition of the Brownmoor properties a marked change occurred in the finances of Italo. Whereas, prior to that time Vincent & Co. were

unable to market stock rapidly enough to meet Italo's needs, sales became very rapid and in the latter half of May Vincent & Co. paid over $300,000 into the company [R. p. 952] which thereupon decided to repay the $80,000 loan a few days after it had been paid and release its pledged properties. On this subject Wilkes [R. pp. 710-711], Shingle [R. pp. 889-890] and Stratton [R. p. 420] testified in accord.

Upon completion of the Brownmoor purchase Italo issued its certificates for 600,000 shares of its preferred stock and 600,000 shares of its common stock to Brownmoor Oil Company which was by Brownmoor distributed to the owners of its stock. Subscribers to the syndicate of $80,000 as the owners of 80,000 shares of Brownmoor stock held in their behalf by Shingle as syndicate trustee received ratably their proportion of 40,000 units of Italo stock upon the surrender by Shingle of the Brownmoor certificates. As a matter of fact, upon the basis of proper distribution by Brownmoor of the 600,000 units of Italo to the holders of 1,000,000 shares of Brownmoor the syndicate should have received 48,000 units. But Shingle, having had no part in the transaction between Italo and Brownmoor, did not know what the basis of distribution was. [R. p. 889.]

The record clearly discloses that the syndicate received from Italo only the return of its money and interest thereon. In refutation of the indictment charges that defendant members of the $80,000 loan syndicate "wrong-

fully" received as a bonus 80,000 shares of Italo to the injury of Italo stockholders, G. S. Goshorn, the government's chief accountant witness, testified:

> "Italo Petroleum Corporation of America never put up the 80,000 shares of Brownmoor Oil Company stock that became the bonus stock for the $80,000 loan syndicate. The four certificates for 20,000 shares each issued in the name of Fred Shingle, aggregating 80,000 shares of Brownmoor Oil Company stock, was deposited with Fred Shingle as collateral security on the $80,000 loan syndicate agreement. *My examination of the books and records of the Italo Petroleum Corporation of America did not disclose that it paid any bonus to any syndicate member on that $80,000 loan."* [R. pp. 651-652.]

As has been related, Frederic Vincent, for the purpose of inducing the loan to Italo, stated that he held options on Brownmoor stock out of which he expected to realize a profit which he promised to divide with Shingle and Brown. On June 11 he came to Shingle and presented him with a check for $83,000 as such share, which was credited as profit to Montgomery Investment Company, a private trading account of partners Shingle, Brown, Jones and Mikel.

Brown testified:

> "I saw Mr. Vincent hand that $83,000 check, Exhibit 149, to Mr. Shingle, about the date the check bears. Vincent came in and laid the check on Mr. Shingle's desk and said, 'I told you boys I would cut you in on my deal and here it is.' Mr. Shingle expressed some astonishment at the size of the check, and Vincent said he had a very successful

deal, thanks to us, and also he was very happy to (have us) become more closely associated with the company. I had a number of conversations with Vincent later, in the next two or three years, and he was very proud of the $83,000. Generally he talked considerably about what a nice piece of money he had made for us boys, * * *

"About the time the postoffice inspectors were engaged in an investigation of this case, I went to Frederic Vincent and asked him what this deal was all about and whether he had ever made any accounting to us, because I wanted to know what the thing was so I could explain it. He said, 'There is no necessity of you knowing anything about this deal at all, it is a deal between broker and broker. You had a perfect right to receive the money and I had a perfect right to give it to you.'" [R. pp. 970-971.]

Later [R. p. 891] and on different days Wilkes brought to Shingle a check for $24,750 and a check for $44,092.90 from Frederic Vincent & Co. which was at his request credited to David Garvey, a brokerage trading account carried by Shingle, Brown & Co., into which he had transferred his own account [R. p. 891] and which was subject to the control of W. J. Cavanaugh [R. p. 751].

Of the $68,842.90 placed in the David Garvey account $50,000 was subscribed in Garvey's name to a second syndicate later referred to herein and subsequently assigned as subscriptions to such syndicate of Perata and Masoni each in the amount of $25,000. These funds according to the testimony of Wilkes [R. pp. 749-751] went to Perata and Masoni in accordance with an agree-

ment between them and Vincent & Co., whereby they had agreed and stood ready to finance half of Vincent & Co.'s purchase of Brownmoor stock. [R. pp. 709-710.] It was also testified that the $25,000 assigned as the subscription of Masoni was later withdrawn by Wilkes who gave Masoni in its stead 21,000 units of Italo stock. The remainder of the funds deposited in the Garvey account from Vincent & Co. were retained by Wilkes pending a settlement from Vincent & Co., who, he asserted, had promised to compensate him in his early activities in the development of the Italo corporations in which he served without salary. [R. p. 771.]

It appears from the record, *although not known to Shingle and Brown at the time of the transaction that Frederic Vincent & Co. were the purchasers of 950,000 of the outstanding 1,000,000 shares of Brownmoor Oil Company* or of the ratable equivalent of Italo stock distributed by Brownmoor, which according to the testimony of government witness Stratton, partner in Frederic Vincent & Co. was purchased as follows:

240,000 units of Italo stock, representing the equivalent of 400,000 shares of Brownmoor from Siens, Shores and Westbrook for $288,000. [Exhibit 151—R. p. 391.]

100,000 shares of Brownmoor stock, variously referred to in the record as the E. M. Brown or Cragen stock from E. M. Brown for $22,500. [R. p. 393.]

250,000 shares of Brownmoor stock variously referred to in the record as the E. M. Brown or Monrovia stock for $60,000. [R. p. 393.]

200,000 shares of Brownmoor stock, the property of one Edna V. Cooper under agreement of sale to one Thomas Conlin for $50,000 and by Conlin assigned to Frederic Vincent & Co. [Exhibit 140—R. p. 380.]

That Frederic Vincent & Co. were the original purchasers in fact of the 550,000 shares of Brownmoor referred to in the last three paragraphs *supra* is further confirmed by [Exhibit 171—R. pp. 405-406], a letter dated May 28, 1928, addressed by A. G. Wilkes to Frederic Vincent & Co. as follows:

"Gentlemen:

"With reference to the purchase of the Brownmoor stock; I have in my possession two Certificates in the name of the Brownmoor Oil Company, one for 600,000 shares of Italo Petroleum Corporation Common Stock and one for 600,000 shares of Italo Petroleum Corporation Preferred stock, which I am authorized to hold until the permit from the Corporation Commissioner is obtained permitting the distribution of this stock to the shareholders of the Brownmoor Oil Company.

"I am also holding for your protection a Certificate for 420,000 shares of Brownmoor stock, out of which you are now the owners of 100,000 shares, which you purchased and have paid for at $22,500.

"I am also holding, assigned in blank, *two contracts,* one of the purchase *of 200,000* shares of the amount of $60,000 on which you have already paid the sum of $25,000, and one for the purchase of *250,000 shares* for the sum of $50,000, on which you have paid $6,000. There is a balance due on these two purchase contracts of $35,000, on the 200,000 share lot, and $44,000 on the 250,000 share lot.

"As soon as these purchase contracts are completed, you will be entitled to receive the 450,000 shares of Brownmoor stock or its equivalent in Italo Petroleum Corporation stock. The distribution of this stock will be in accordance with our understanding.

"Yours very truly,

A. G. WILKES."

From the records of Italo it appeared that when the certificates for 600,000 units of Italo stock issued to Brownmoor were broken up, certificates for 230,000 units were placed in the name of Fred Shingle. These were in four certificates representing 34,583 shares of common stock, 34,583 shares of preferred stock, 195,417 shares of common stock and 195,417 shares of preferred stock.

But it was also shown that to the receipts for such certificates the name of Fred Shingle was forged or otherwise applied by Frederic Vincent. This was stipulated by the government [R. p. 269] and admitted by Frederic Vincent. [R. p. 440.]

Stratton and Vincent in their testimony declared that they had purchased this 230,000 units of stock from Fred Shingle, despite their previous testimony and written evidence that they had bought and contracted to buy all of the Brownmoor stock or its equivalent less 50,000 shares and thus attempted to explain the checks for $83,000, $24,750 and $44,092.90 above referred to.

Bearing in mind that Frederic Vincent & Co. had bought or contracted to buy all of the Brownmoor stock

or its equivalent except 50,000 shares we cite the testimony on this subject of Frederic Vincent:

> "Stratton and myself purchased some stock through Wilkes purported to belong to E. M. Brown, and also some stock that purported to belong to Edna V. Cooper, all of which was Brownmoor stock, and also stock that purported to belong to Siens, Westbrook and Shores. Wilkes was the only person that I talked to about purchasing this stock. We also purchased some 230,000 shares of stock *which was carried in the name of Fred Shingle. I talked to Wilkes concerning the purchase of this stock. I do not recall talking to anybody else.* This 230,000 units of stock was Italo stock and not Brownmoor stock. This receipt, Exhibit '38,' signed by Fred Shingle, dated June 1, 1928, is signed by me. The words 'Fred Shingle' are in my handwriting on that receipt. I do not remember the circumstances under which I placed my handwriting on those receipts." [R. p. 440.]

And again:

> "I received a 230,000 unit lot of Italo Pete stock in the name of Fred Shingle and signed Exhibit '38' which was a receipt for that stock. *It is my recollection that I did not talk to Fred Shingle or Horace Brown or any member of the firm of Shingle, Brown & Company about signing these receipts. The sole source of my information was from conversations with Wilkes."* [R. p. 443.]

Witness Stratton [R. pp. 424-425-426] made a lengthy and involved statement *that although his firm was already the purchaser of all the Brownmoor stock as confirmed*

by the Wilkes letter he was told by Wilkes another large block of stock had to be purchased through the office of Shingle, Brown & Co., to adjust some error, that he did so and the checks issued were his only records of the transaction. He stated that in the transaction involving 230,000 units of stock he never discussed the matter or dealt with Shingle or Brown or with any member or representative of the firm of Shingle, Brown & Co. He discussed the subject only with Wilkes and Vincent and did not remember ever asking Wilkes what the mistake or adjustment was which led him to pay twice for the same stock.

Shingle testified [R. pp. 891-892] that he may have endorsed the certificates in question as a matter of accommodation, he or his firm never owned the stock or had any interest in it and there was lacking in the records of Shingle, Brown & Co. any record of it. Witness Byers, former auditor of Shingle, Brown & Co., testified [R. pp. 952-953] that a diligent search of the records failed to show any entry in respect thereto. Brown testified to the same effect [R. pp. 972-973], and further testified:

> "With respect to the testimony of Mr. Stratton, referred to by Mr. Wharton on cross-examination, to the effect that Frederic Vincent & Company purchased 195,000 units of Italo Petroleum Corporation of America on June 11, 1928, and paid Shingle, Brown & Company the sum of $107,750.00 therefor, and two days later bought an additional 34,000 units of the same stock and paid therefor $44,000, *it is not a fact that we sold Frederic Vincent & Company 195,000 units of said stock on June 11, 1928, and received therefor the sum of $107,750.00. It is not*

true that two days later we received $44,000-odd for 34,000 units of said stock. A little simple arithmetic would show that the first transaction represented by those checks the price would be 55 cents per unit, and the next block the next day represented $1.27½ per unit. It does not make any sense. *We did not sell any stock; we never owned it."* [R. pp. 1021-1022.]

Wilkes testified [R. pp. 748-750] that he caused the certificates in question to be issued in Shingle's name in order to protect Perata and Masoni in their dealings with Vincent, in so doing did not discuss the matter with Shingle but may have told him that he was going to do so as a matter of accommodation, and *that neither Shingle nor Shingle, Brown & Co. had any interest in the certificates.*

In further refutation of the Stratton and Vincent story of the purchase of stock from Shingle or his firm defendants introduced into evidence a pencilled memorandum [Exhibit E—R. p. 426] in the handwriting of Stratton concerning the disposal of 270,000 units of Italo stock apparently accounting for the equivalent of the 450,000 shares of Brownmoor stock purchased by Frederic Vincent & Co. from E. M. Brown (the Monrovia stock) and from Cooper. This exhibit, taken in connection with the Wilkes letter of confirmation (*supra*) completely accounts for the 270,000 units, and shows that after the deduction of 40,000 units which Vincent & Co. gave to the $80,000 syndicate and the deduction of 91,666 units at $1.20 representing Vincent & Co.'s cost of the stock—$110,000, Shingle, Brown & Co. is credited

with $83,000 cash, representing half of the profit of the transaction.

While Stratton under cross-examination [R. pp. 426-427-428] admitted the writing but couldn't recall the reason for making it, he could think of no combination of circumstances in which it reflected any other facts than the donation from the stock previously purchased by Frederic Vincent & Co. of 40,000 units to the syndicate and the division of profit with Shingle, Brown & Co. and declared that neither his partner Vincent nor Wilkes had ever told him of the arrangement between Vincent & Co. and Shingle, Brown & Co.

In preparing his chart, Exhibit 299, purporting to be a summary of the disposition of the 600,000 units of Italo received by Brownmoor Oil Company for its properties and ascribing 230,000 units thereof to Fred Shingle, *government accountant Goshorn admitted on cross-examination* [R. pp. 678-679] *that he had found no record anywhere that Vincent & Co. had purchased the 230,000 units from Shingle or Shingle, Brown & Co.* except the checks made to Montgomery Investment Co. and the fact that the certificates were once issued in Shingle's name, that there was no record of confirmation of such sale and no record showing that Shingle ever received the stock.

Government witness *Goshorn further testified* at length [R. pp. 655-656] analyzing Exhibit 171, the Wilkes letter of confirmation to Vincent & Co., and Exhibit E, the Stratton memorandum, which he had not previously examined in preparing his chart, and stated *as a result of such examination and analysis it to be a fact that the 450,000 shares of Brownmoor resulting in 270,000 units*

of Italo had been purchased by Frederic Vincent & Co. for $110,000, that the 230,000 units receipted for by Frederic Vincent in signing Fred Shingle's name to Exhibit 36 were retransferred to Frederic Vincent & Co.'s nominees and that no part of this stock went back to Shingle.

Government witness Lyle, transfer agent of Italo, testified on this subject:

> "The fact that Exhibit 38 is signed by Frederic Vincent would absolutely indicate to me that Frederic Vincent is the one who received certificates numbered 984 and 985, part of Exhibit 37." [R. p. 304.]

And government witness Sunderhauf, also transfer agent and assistant secretary of Italo, testified that he never received any instructions from Shingle or Brown to issue the certificates above referred to, that the certificates were surrendered to Frederic Vincent & Co., retransferred in part to several hundred people pursuant to Vincent & Co. instructions, the remainder issued back to Vincent & Co. and that none of the stock was issued to Shingle or Brown. [R. pp. 277-278.]

The charges of the indictment that all of the 600,000 units of Italo received by Brownmoor Oil Co. were distributed by Brownmoor to its stockholders prior to the receipt of permit therefor from the Commissioner of Corporations and in violation thereof in that such permit authorized the distribution of only 575,000 units appear to be true, *although in what way such actions by the officials of Brownmoor constituted any part of a plan to defraud Italo is not made manifest.* The record shows that the permit authorizing Italo to issue the 600,000

units to Brownmoor in exchange for its properties was issued May 16, 1928. The certificates for the 600,000 units [Ex. 37—R. p. 277] were issued to Brownmoor Oil Co., pursuant to such authority under date of June 1, 1928, registered June 7, 1928, and delivered later. Vincent received and broke up some of the stock to deliver to his clients June 15, 1928. It appears that the permit of the Corporation Department authorizing the distribution by the Brownmoor was issued June 19, 1928. [Ex. 274—R. p. 512.]

It is also charged in the indictment that some of the Italo stock was distributed to persons other than stockholders of Brownmoor, in support of which the government introduced into evidence a schedule prepared by accountant Goshorn from the stock certificates books of Brownmoor Oil Co. [Ex. 298—R. pp. 632-633.] It later appeared, however, upon production of the records of Bank of America (formerly Merchants National Trust & Savings Bank of Los Angeles), registrar and transfer agent [Ex. 147—R. pp. 650-651], that the government exhibit was not the true record, Brownmoor Oil Co. having changed its capital structure [R. p. 815] and the records of issuance of stock thereafter kept by the bank. Goshorn had made no examination of these records.

It abundantly appears from the record that Frederic Vincent & Co. was the purchaser, either of Brownmoor stock in its original form or units of Italo resulting therefrom of all except 30,000 units of the 600,000 units of

Italo resulting from the sale of Brownmoor assets and received the stock so purchased, so that *the Brownmoor distribution appears to have been made to the persons entitled thereto. It is not claimed that the Brownmoor stockholders were defrauded.*

At any rate Shingle and Brown, not being officers or directors of Brownmoor had no responsibilities for the distribution of its stock.

That neither Shingle nor Brown had any connection with either Italo or Brownmoor corporation was testified by Shingle:

> "Neither Horace Brown, Axton Jones, Rossiter Mikel nor myself was ever a director or officer of the Italo American or Italo Petroleum Corporation or the Brownmoor corporation, or of any of the other corporations which have been mentioned here, except Shingle, Brown & Company.
>
> "I knew nothing at any time of any connection or transaction of Siens, Westbrook, Shores, Mrs. Cooper, Cragen, or any one else with the Brownmoor Oil Company, and never heard of any of those transactions." [R. p. 898.]

The foregoing recitals are made at some length because the indictment alleged improper distribution of Brownmoor stock and government witnesses Stratton and Vincent endeavored to falsely show that Shingle and Brown were involved in transactions in which they had no part. Appellants maintain that their recitals of what actually oc-

curred are correct, so proven by the facts evolved and that their actions in the Brownmoor transaction were wholly within their rights as independent brokers in nowise connected with either Italo or Brownmoor as officers, directors, agents or in any fiduciary capacity.

That the $83,000 received by Shingle for himself and partners from Frederic Vincent & Co. in accordance with the latter's agreement to divide its profits, while substantial was not extraordinarily munificent, is evidenced by the facts appearing in the record. It appears therefrom that Frederic Vincent & Co.'s total cost for the 950,000 shares of Brownmoor or the resultant 570,000 units of Italo was $420,500, made up as follows: 550,000 shares of Brownmoor equalling 330,000 units of Italo purchased as per Wilke's letter [Exhibit 171—R. pp. 405-6], $132,500; 240,000 units of Italo (equalling 400,000 shares of Brownmoor) purchased from Siens, Shores and Westbrook [Exhibit 151—R. p. 391], $288,000. Stratton testified [R. p. 430] that about the time Frederic Vincent & Co. received the stock, June 14, 1928, "we were selling the stock at $2.50 per unit." At this rate the 570,000 units, less the 40,000 units given to the syndicate, represents a gross selling price of $1,325,000 against a cost of $420,500, *or a gross profit before sales expense of $904,500.*

BIG SYNDICATE.

As the McKeon brief on appeal deals extensively with the general subject matter of the second or so-called big syndicate operation we will refer herein principally to certain supplementary evidentiary facts having to do with the activities of Shingle and Brown in connection therewith. [McKeon Brief pp. 77-115.]

The syndicate operation, of which Fred Shingle was manager, resolved itself into a simple underwriting of cash payment obligations of Italo on property purchase contracts up to $3,500,000. Italo, under a permit issued August 9th, 1928, by the Commissioner of Corporations [Ex. 18-25—R. p. 535], was authorized to issue 12,000,000 shares of stock to Maurice C. Meyers, as Trustee, to be used to acquire certain properties subject to indebtedness not to exceed $2,750,000. The contracts for these properties, including those of McKeon Drilling Co. and Graham-Loftus Co. called for payments in stock of approximately 6,000,000 shares and in cash approximately $6,250,000, of which $3,500,000 had to be paid within a period of a few months. The syndicate underwrote and paid the urgent cash requirements of approximately $3,500,000 for which it received 3,000,000 units or 6,000,000 shares of stock, pursuant to agreements entered into with Trustee Meyers and Italo. [Ex. 83—R. p. 304; Ex. 84—R. p. 302.] The payments in stock were handled solely by Trustee Meyers and accounted for by him to Italo, the syndicate having nothing to do with that phase of the transaction.

The syndicate through advancement of its own subscribed funds of $1,911,375, including the amount subscribed by Shingle, Brown & Co., and from the proceeds

of sales of stock completed its contract and on December 20, 1928, received a full release of its obligations from Italo and from Meyers, Trustee. [R. pp. 916-917.] It thereupon became the owner of all of the remaining unsold stock underwritten by it and had no further connection with or responsibility to Italo or Meyers, Trustee.

Most of the payments by the syndicate for property accounts were made to Maurice C. Meyers, attorney for Italo and Trustee of the 12,000,000 share issue and accounted for by him to the Syndicate Manager. Such accounting, consisting of many transactions is contained in Exhibit 308. In respect to such accounting Meyers testified:

> "I rendered an accounting as two trustees, really; one was as trustee of the syndicate in the handling of the money, and the other was trustee for the company as to the 6,000,000 shares of stock. As trustee for the syndicate I handled over $3,000,000; it was close to $3,400,000, although some of the money was disbursed at San Francisco.
>
> "At the conclusion of my trusteeship, accountings were rendered to the company and to the syndicate. To the best of my knowledge and belief the accountings rendered by me as trustee to the syndicate and the company were true and correct accountings.
>
> "The remittances from Shingle, Brown & Company or from Fred Shingle, syndicate manager, were to apply on purchase contracts that had already been made. As such trustee I carried out to the best of my ability the contracts already entered into for the acquisition of properties by the Italo, both for the payment of money and the disbursing of stock." [R. p. 1046.]

Other smaller payments on properties closed in the northern part of the state were made through Melvin and Sullivan, San Francisco counsel for Italo, and balance of payments in final adjustment of the account were made direct to Italo.

That the syndicate was organized for a legitimate financial purpose, that its relations with Italo were at all times fair and above board, that it entered into a fair contract with Italo to underwrite and purchase a block of Italo's stock at a fairly negotiated price and did faithfully perform its contract is abundantly shown by the record and is not disputed by any evidence therein contained. The syndicate did not, nor did Shingle or Brown ever receive one cent of commission or compensation from Italo, the syndicate underwriting being at a net price.

Shingle and Brown Not Connected With Property Purchase Negotiations.

That neither Shingle nor Brown had anything to do with negotiations for the purchase of any of the properties acquired by Italo is affirmatively shown by the record and is not in any manner disputed by the government. On this subject Brown testified:

> "Neither Mr. Shingle nor myself had anything whatsoever to do with the negotiations for or the making of the contracts for the acquisition of any of those properties." [R. p. 988.]

Robert McKeon testified [R. p. 1184] *that all of his negotiations concerning the McKeon Drilling Co. properties were with Wilkes representing Italo "and neither Fred Shingle, nor Horace Brown had anything to do with those negotiations."*

Syndicate Management.

The McKeon brief [pp. 95-108] deals fully with the failure of Frederic Vincent & Co. to perform its functions as the sales agency of the syndicate and the crucial situation leading to the formation of a group of stock exchange brokers to handle the financing as a market transaction, Shingle, Brown & Co., Inc., joining this group or pool. On this subject Brown testified:

> "There was never at any time any secrecy about the fact that Mr. Shingle would be the syndicate manager or that Shingle, Brown & Company were members of this brokerage pool. We became members of the brokerage pool very largely because if it was not good enough for us to take hold of our fellow brokers naturally would not join, and we were also willing to do it because we believed the company had a great future.
>
> "The officers of the Italo Petroleum Company were well acquainted with the fact that Mr. Shingle, in addition to being syndicate manager, was also interested in Shingle, Brown & Company and that Shingle, Brown & Company was a member of the pool, and they were delighted that we were. *In fact the officers of the Italo Company insisted that we try to form the pool in order to save the situation.*" [R. pp. 994-995.]

Occupying a somewhat dual position as Syndicate Manager and as an officer of Shingle, Brown & Co., a pool member, Shingle in fairness to his syndicate exacted a higher price from the pool for the common stock optioned to it than Frederic Vincent & Co. had been paying. The Vincent price had been $1.60 per unit net to the syndicate,

which in transactions involving sales of classes of stock separately, was divided as 57 cents per share for preferred stock and $1.03 per share for common. As Shingle testified:

> "We gave the pool members an option on 2,500,000 shares of common stock at various prices. As I remember, it was $1.05 for the first 500,000 shares, $1.10 for the second 500,000 shares, $1.15 for the third, and $1.20 and $1.25, a 5-cent step-up to the syndicate on each 500,000 shares." [R. p. 913.]

The option agreement dated October 15, 1928, addressed to Plunkett-Lilienthal & Co., Geary, Meigs & Co., Graham, Atkinson & Co., and Shingle, Brown & Co. [Exhibit 322—R. p. 942] recites the prices above stated less a selling commission of not to exceed $20 per 1000 shares, which Shingle testified would be a maximum of $10,000 commission on 500,000 shares.

As above related, with the settlement of the syndicate's account with Italo the remainder of the 3,000,000 units became the property of the syndicate in accordance with its purchase agreement and the syndicate had no further relations with Italo or with Meyers, Trustee. From time to time as proceeds from the sale of stock to the brokers pools were received such funds were distributed ratably to the members of the syndicate as their respective interests appeared. The return in cash to the members of the syndicate was approximately 52 per cent of the amount of their subscriptions and at the termination of the syndicate the remaining stock, amounting to approximately 2,500,000 shares of preferred and 900,000 shares of common were distributed ratably to the members of the syndicate. [R. p.

934.] Each member of the syndicate was furnished with a photostatic copy of the report of audit of the syndicate operations made by Lybrand, Ross Bros. & Montgomery, public accountants, and signed a receipt fully acquitting and releasing the Syndicate Manager. *There is no evidence in the record of any criticism by any of the more than 70 members of the syndicate concerning its management, which involved the handling of some $4,500,000.*

If Shingle and Brown had been better guessers it is probable that more of the syndicate stock would have been marketed in the spring of 1929 and a larger cash return made to the syndicate members. At that time negotiations were on, as will later be detailed, for the inclusion of the Italo properties into a larger company which John McKeon was to head, the deal being under negotiation with New York bankers. On this subject Shingle testified:

> "The big deal was never concluded. By that I mean the eastern deal. It was pretty well abandoned in the summer of 1929. If the deal had gone through on the basis Mr. McKeon was negotiating in New York the price of the Italo stock which would have been converted into the new name, which was going to be the McKeon Oil Company, would be $16 to $18 a share, which represents $1.60 to $1.80 per share for the old $1.00 par stock. We found ourselves in a rather embarrassing position with respect to the syndicate stock. The syndicate agreement gave the syndicate manager very broad powers. We could do what we wanted with the stock, but Mr. Brown and myself had a great many talks on the subject, and if we had sold any syndicate stock at around $5.00 or $10.00 or even lower, or at any

price, we would have sold it, we thought if the McKeon deal had gone through we would have been very severely criticized. During all of this time the market was very substantially less than $1.60 per share for the common. If the big deal had gone through as we expected it would, we would have been subjected to criticism and a great many of the large syndicate members, the members who had the largest amount in the syndicate, did not want us to sell, because it was for quite a while almost a certainty that the deal would go through. We discussed that question with some of the larger syndicate members and took their advice and acted as they suggested, and also it was our own judgment that we had better hold it." [R. pp. 926-927.]

The facts stated by Shingle were not disputed by the government in any way.

The controversy with Frederic Vincent & Co. resulting in its elimination as sales agent for the syndicate is fully covered in the McKeon brief and reference will be made here to one phase of the transaction to which the government endeavored, by inference, to attach a malign significance.

In settling with Vincent & Co., Shingle was advised that the former required about 100,000 units to complete its sales contracts previously made. Shingle thereupon reserved 122,000 units to take care of Vincent & Co.'s requirements and optioned all of the remainder of the unsold syndicate common stock to the brokers pool in the amount of 2,500,000 shares, to William Lacy in the amount of 100,000 shares and to a New York syndicate in the amount of 100,000 shares. [R. p. 991.]

Shortly thereafter Vincent & Co. made a demand, backed by threat of legal action, for additional stock to fill partial payment contracts of which they had previously failed to advise Shingle. In this emergency John McKeon agreed to fill Vincent & Co.'s requirements above the reservations made by the syndicate from the McKeon Drilling Co. stock in escrow with Shingle, Brown & Co.

Through an oversight in the accounting department Vincent & Co. was supplied from the syndicate stock 46,819 shares of common and 66,819 shares of preferred over and above the 122,000 units reserved for this purpose. When this was discovered December 12, 1928, the exact amount of stock so oversold was returned to the syndicate and $86,310.40, the exact amount paid into the syndicate therefor, was taken from the syndicate account and paid to McKeon Drilling Co.

The syndicate was not injured by the transaction and was in fact at the time benefited. As Brown testified [R. pp. 1000-1-2] the syndicate could have retained the proceeds of surplus sales of preferred stock to Vincent & Co. as it was not under option. But the Vincent price was 57 cents per share as against an open market price of 70 to 80 cents and the syndicate was benefited by the substitution of the McKeon stock, and as a matter of fact the syndicate did subsequently sell a considerable amount of preferred stock at prices ranging from 60 to 80 cents a share. *It should be remembered that there is no charge that the syndicate members were defrauded, but only that the syndicate members expected to profit from syndicate operations.*

Brokers Pools.

It is important that the court understand that the brokers constituting the pools which optioned and purchased Italo stock from the syndicate made a proper and careful examination of the affairs of Italo before entering the situation. While in the hectic days of 1928 with a widespread speculative interest in all securities most financial glasses were rose tinted, it is shown by facts adduced at the trial of the case that the brokers were justified in concluding that the properties being acquired were of great value and earning power and that Italo was destined to be a successful business operation.

It is equally important that the attention of the court be called to the manner in which the brokers handled the matter as a legitimate stock exchange transaction and not by inducing sales to the credulous and unwary through the employment of high-powered salesmen or through the circulation of literature designed to entice or deceive. There is no evidence that these reputable brokers, of standing and character in the communities in which they did business, engaged in practices of market rigging or created fictitious market prices, and only affirmative evidence, undisputed, that they handled the transactions on the open market as controlled by the laws of supply and demand in a highly speculative period.

The brokerage houses which variously were members of all or some of three successive pools which were organized to purchase stock from the syndicate were Shingle, Brown & Co., a corporation, Plunkett-Lilienthal & Co. and Geary, Meigs & Co. of San Francisco, and Graham-Adkisson & Co., M. H. Lewis & Co. and Dunk-Harbison & Co. of Los Angeles.

It is significant that at the trial of the case not a single witness from thousands of stockholders of Italo was produced who ever bought a share of Italo stock from Shingle, Brown & Co. or any of the brokers above named or on account of any representations made by them.

Government witnesses who testified that they purchased or otherwise acquired stock of Italo include Geis [R. pp. 539-540], Keating [R. p. 541], Hopkins [R. pp. 547-550], Willman [R. pp. 551-552], Hudspeth [R. p. 553] and Riniker [R. pp. 555-557], who acquired stock direct from one or the other Italo companies in exchange for their interests in other oil companies; Cohn [R. pp. 506-507], Robert [R. pp. 500-506], Anderson [R. p. 586] and Godfrey [R. p. 496], who bought stock from Frederic Vincent & Co.; Marks [R. p. 584], who bought stock from one Bentley and Gartner [R. p. 485], Biagini [R. pp. 488-492] and Rohde [R. pp. 577-583], who bought stock on the open market through other brokers.

As to the condition of Italo and the value and earning power of the properties which it was acquiring when the brokers undertook their investigation much appears in the record, which, on account of the extensive comment thereon in the brief prepared by counsel for John and Robert McKeon lengthy reference here would mean unnecessary duplication. Shingle testified:

> "So in this particular case, before the other brokers would join this pool, they naturally made a lot of investigations on their own behalf. There are three things that a broker wants to know about anything. First, what is the value of the property? Second, what is the management? And, third, what are the earnings? That is the foundation for any bond issue or stock issue." [R. p. 939.]

Included in the written data available for examination at that time as testified to by Brown [R. p. 987] were:

The Starke and Thomas appraisals of the value of the properties being acquired in exchange for 12,000,000 shares of Italo together with the compilation prepared therefrom by Engineer Abel of the Corporation Department. [R. p. 526.] This compilation shows a valuation, taking the lowest figures of various appraising engineers, of $29,416,860 and is followed by Abel's own computation combining lowest values of actual and possible production to reach a total valuation of $17,120,463 to which is added value of equipment, making a total estimated valuation of $18,847,158. As the properties were being acquired subject to $2,750,000 further purchase obligations, the net value was in excess of $16,000,000.

The certified statement of Wunner Ackerman & Sully, Certified Public Accountants [R. pp. 530-531] that the properties being acquired with the addition of those of the Brownmoor Oil Company previously acquired earned a total income for the month of July, 1928, of $354,-182.67.

The pro forma balance sheet certified to by the same firm of accountants [R. pp. 532-533-534] showed the condition of Italo after giving effect to the acquisition of the properties under contract of purchase. While the value placed upon the properties being acquired is greater than the par value of the stock being issued to acquire them the explanatory and qualifying comments of the auditors are such as to be in nowise misleading.

The brokers also examined into the Trumble refining process which Italo had an option to acquire subject to

tests financed by Italo and conducted by Trumble and considered it had favorable prospects. [R. p. 990.] Brown also had a discussion with Trumble concerning his process and secured a letter from him addressed to the Italo Company. [R. p. 1006—Exhibit QQ.]

It appears from the record that Italo had an option to purchase the Trumble patents to which reference is made in the minutes of a meeting of the directors of the corporation held August 17, 1928. [R. p. 244.] Robert McKeon in his testimony [R. pp. 1175-1176] refers at length to the experience of the company in testing Trumble's process for commercial use and the result thereof, stating that Italo still has whatever rights there were in the patents.

In addition to examining the information available the brokers considered that the company needed more representative and experienced management and insisted that John McKeon assume active charge. This McKeon was willing to do at a later date but could not get away from Richfield of which he was vice-president in charge of production until some time later. In the meantime he suggested associating William Lacy of Los Angeles whom he regarded as "a very good oil man" in the company and asking him to serve as president. Upon investigation the brokers considered the suggestion favorably. As testified by Shingle [R. p. 912] Mr. Lacy was very prominently identified with the business and public life of Los Angeles, being head of the Lacy Manufacturing Co., a director of the Farmers & Merchants Bank, a former president of the Chamber of Commerce, head of the Community Chest.

Mr. Lacy was already somewhat familiar with Italo, of which his brother-in-law, Fred V. Gordon, a former

official of California Petroleum Corporation, was vice president, and had, himself, subscribed $100,000 to the Shingle Syndicate and had borrowed $300,000 for Italo to meet the recent Graham-Loftus payment crisis. After a careful examination he consented to assume the Presidency which he did October 16, 1928. To show his faith in the enterprise he wished to acquire a block of stock and took an option from the Syndicate on 100,000 shares of common which he later exercised and paid therefor the sum of $100,000. Mr. Lacy also wished to surround himself with some of his business associates and brought with him to the Board of Directors William Chapin, Fred Keeler, Robert McLachlen and Hugh Stewart. Robert McKeon at this time took charge of the field operations.

This was the picture developed in the examination of the situation by the brokers before interesting themselves in the financing. As Brown testified:

> "About the middle of October, 1928, when Mr. Lacy and the other members of the board of directors were elected, I had and was receiving statements of the auditors, including the earnings of the properties. I had a long talk with Mr. Lacy in San Francisco, on October 16th, the day he was inducted into office as president, and he was highly enthusiastic over the situation. He stated he had made an investigation of the company on his own account, and likewise Fred Gordon, who was a vice-president of the company, and formerly vice-president of the California Petroleum Company. The picture was about this: The company, according to the statement of the auditors of the properties they were acquiring were earning about $354,000 a month in July; they had a production of thirteen to fourteen thousand barrels

of oil a day, practically all light oil, in the Los Angeles basin, and some in the San Joaquin Valley. They seemed to have assurance of good management through Mr. Lacy. In addition to this it looked like an extremely interesting speculative picture for the development of an oil company of considerable size. As a matter of fact, I think at that time it was the 9th, 10th, or 11th in size in California as a producer of oil." [R. pp. 998-999.]

In support of the statements made to the investigating brokers there is abundant evidence in the record as to the then value of the properties acquired, particularly as to the value and earnings of the McKeon and Graham-Loftus properties which constituted the principal acquisitions and which is fully set forth in the McKeon brief on appeal, so that only a brief reference to these points will be made here.

L. J. Byers, supervisor of accounting for the Italo receiver at the time of the trial, testified [R. pp. 850-851] that the McKeon properties for the two and a half months period from the time they were taken over, October 15, 1928, to December 31, 1928, brought in a gross income of $284,118.55 or net after operating expenses of $246,-176.41. The Graham-Loftus properties netted $1,233,000 in 1928, but were acquired earlier. In 1929 the McKeon properties netted $954,572.49 and the Graham-Loftus properties $1,336,535.34.

A report to the Board of Directors [R. pp. 252-253] by General Manager Robert McKeon shows gross income for the first four months of 1929 from oil and gas of $1,147,784.73 or an operating profit of $1,082,588.93, produced from 194 wells.

Government witness McLachlen, assistant secretary and employed in the land department of Italo, testified:

> "I was familiar with the holdings of the corporation. The company had approximately two hundred producing wells distributed over approximately 40 to 50 parcels of land. It had approximately 2000 acres of oil producing properties and approximately 40,000 to 45,000 acres of prospective oil properties. In New Mexico we had approximately 23,000 acres of prospective oil lands spread through approximately fourteen different counties along a major trend of oil fields that came in through Texas, through Mexico, and on into the panhandle of Texas, which I would consider prospective oil lands, and which was generally known among oil men as prospective oil lands." [R. p. 230.]

Concerning the manner in which the brokers pools handled the stock Shingle testified:

> "A stock market operation is where you sell through the medium of the stock exchange. You don't know who buys the stock. It is a demand which comes daily on the stock exchange for that stock. We were not proposing to create a swelled or false market price for the stock. We did not propose to sell the stock directly to the public but only through the stock exchange, and through stock exchange members. The stock at that time was listed on the San Francisco and Los Angeles Curb Exchanges." [R. pp. 910-911.]

In further reference to practices pursued in the stock exchange operations Shingle testified:

"Those are not the men who actually sell the stock over the counter. They sell the stock to pool members. We do not know where the pool members sell the stock; no one knows where they sell it. It is a clearing house, like a bank clearing house. In other words, we send a representative over to the Stock Exchange and there is an order in there to buy 5000 shares of stock or 10,000 shares or 500 shares, and there are probably sixty or seventy brokers on that floor. There were probably 72 different representatives on the floor. It is like any other commodity; it is nothing but supply and demand. Somebody wants to by 5000 shares and somebody wants to sell 5000 shares. * * * There is more distributing among the brokers than selling stock. For instance, during the month of December, 1928, we bought something like 179,000 or 180,000 more shares of stock than we ever really sold. As I remember it, the prices fixed by the syndicate manager for sale of the stock to the pool members fluctuated up for each 500,000 share lot. One pool would sell to another pool. The object of pools is to make profits, but they might make losses. Pool A might sell to pool B or to pool C and make a profit, and the pool members would derive a portion of whatever profit was made.

"So far as the market price is concerned, there is not the slightest difference between operations by a pool and a single broker. The only difference is that in a pool there are three or four or a half a dozen acting in concert instead of one. In marketing stock on the exchange there are certain brokers who have

orders to buy and other brokers who have orders to sell, and we sell stock only when there are more people buying than there are selling. With this pool that I had here, they simply had a contract with me as syndicate manager to option some of this stock that they knew they could get. Whenever there were more sales on the exchange than buys, I got rid of some of the syndicate stock. When other people who had bought stock but wanted to sell it to our pool, we had to buy that stock to maintain the market, and then resell that stock when there was an opportunity again. The syndicate stock simply went out as there was a surplus or excess demand over the outside supply, but of course the operators of the pool are always interested in trying to keep the price at a level. In that respect there is no difference between a pool and a single operator. The only reason for forming a pool is to get more people, to get more money, to get more responsibility back of it." [R. pp. 940-941-942.]

There is no evidence in the record that any of the brokers engaged in the market operation solicited sales through salesmen or otherwise and no evidence that they circulated or mailed any prospectus or other written matter or had anything whatever to do by suggestion or otherwise as to the information mailed by Italo to its stockholders.

The only piece of written matter introduced into evidence was a statistical summary of the Italo situation prepared by Brown which, after preparation, was approved by Fred V. Gordon, Vice-President of the Com-

pany. (Exhibit SS.) Concerning this matter Brown testified:

"In January, 1929, I came to Los Angeles and spent two or three days around the company's offices in getting general information. I had in mind at that time two things. I wanted to give the brokers who were interested what I found was a fair picture of the actual condition of the company, and also had in mind the financing of the company itself for two to two and a half million dollars bond issue. Mr. M. H. Lewis of M. H. Lewis & Company went over to the office with me. I spent a couple of days talking with the production department, and on the financial end, getting figures and facts together. I saw Mr. Lacy over there a number of times and talked with him about the condition of the company. He was very enthusiastic at the time. The company had production then of thirteen to fourteen thousand barrels, had about 12 sets of tools working drilling, only one of which was what is known as wildcat, and were expecting larger production. Mr. Lacy said he didn't think any more syndicate stock should be placed on the market at the time. He thought the stock would be worth $3.00 to $4.00 a share. He had just exercised his option at that time to buy 100,000 shares for $100,000. I also talked to Mr. Fred Gordon and he was equally enthusiastic, and was also enthusiastic over the eastern deal if it could be made on a proper basis.

"As a result of these conversations with Lacy and Gordon I made some pencil memorandums and went back and dictated this general memorandum and took it back to the office and had Mr. Gordon go over it as vice-president of the company and put his

name on the top as his approval. This is a copy of the statement that Mr. Gordon wrote his O. K. on." [R. pp. 1008-1009.]

Government witness Byers testified regarding this document:

"Exhibit 300 in evidence is similar to the usual forms used by brokerage houses for the purpose of furnishing information concerning securities that are listed on a particular exchange, of which that brokerage house may be a member, and in which trading takes place. Such statistical information is put out in forms similar to Exhibit 300 and left in the brokerage offices for the information of any persons who may come in with inquiries pertaining to that particular security. So far as I know that is all that was done with Exhibit 300. This other document that you have handed me is identical with Exhibit 300, except that it is put out by the firm of Plunkett-Lilienthal & Company of San Francisco, which firm were members of the San Francisco Stock Exchange and the San Francisco Curb Exchange." [R. pp. 682-683.]

Distribution of McKeon Escrowed Stock.

While the McKeon appeal brief deals extensively with the deposit in escrow and subsequent disposition of the Italo stock received by McKeon Drilling Co. we feel that some further facts should be presented in order to clarify the position of Shingle, Brown & Co., Inc., which acted as escrow holder and observed the directions of the McKeons in respect thereto.

The McKeon stock consisting of 3,440,000 shares of common and 940,000 shares of preferred was deposited

in escrow with Shingle, Brown & Co. October 26, 1928, pursuant to the request of the brokers' pool to insure against flooding the market with outside stock while they were engaged in financing the Syndicate's obligations to Italo. The written escrow instructions, calling for deposit for 90 days, directed to Shingle, Brown & Co., recite: "The purpose of and consideration for such escrow is the protection of the market operation in which you are engaged." [Ex. 98; R. pp. 328-329.]

This stock was deposited by McKeon Drilling Co. as its own property and held by Shingle, Brown & Co. subject only to the written instructions of the officers and agents of McKeon Company. Government witness L. J. Byers, former auditor for Shingle. Brown & Co., testified [R. pp. 465-466] that he supervised the escrow in the same manner as other trusts and escrows in the office of the firm and that the disbursements therefrom were made pursuant to instructions from McKeon Drilling Co. On this subject government witness Goshorn testified:

> "*From my examination of the escrow record I know that that stock was held by Shingle, Brown & Company solely as an escrow holder to be distributed by it pursuant to any instructions that were received by it from the McKeon Drilling Company.* I found from my examination of the books and records in evidence that the stock was distributed pursuant to written order given either by the McKeon Drilling Company or one of the three McKeon brothers, and that in each instance when any stock was distributed out of that escrow it was done pursuant to written order and a receipt was taken therefor." [R. p. 662.]

Orders for current and future disposition of the McKeon stock were several in number and varied in purpose and were as follows:

Direction November 13, 1928 [R. p. 348] to set aside 300,000 units for the Frederic Vincent & Co. settlement. Pursuant to this order and by written direction December 12, 1928 [Ex. 104; R. p. 331] there was sold 46,819 shares of common and 66,819 preferred to Frederic Vincent & Co. for $86,310.40 which was so done and the proceeds paid to McKeon Drilling Co. On December 18 an additional 198,735 shares of common and 196,035 shares of preferred were deposited with Bank of Italy to cover Frederic Vincent & Co.'s installment sales. Of such deposit 125,000 shares of common and 125,000 shares of preferred were without cash consideration. The remainder—73,735 common and 71,035 preferred—was sold to Frederic Vincent & Co. and pursuant to order of McKeon Drilling Co. [Ex. 112; R. p. 334] the proceeds received in February, 1929, distributed in equal fourth parts to McKeon Drilling Co., E. Byron Siens, A. G. Wilkes and Shingle, Brown & Co.

Direction November 21, 1928 [Ex. 102; R. p. 329] to deliver 500 units to Maurice C. Meyers, Trustee, to reimburse him for a like number of shares deposited in Farmers & Merchants Bank for International Securities' account.

Direction November 21, 1928, to sell sufficient shares to net $125,000 to be paid to Italo to settle an old lease account of the McKeons with Italo. This stock was not sold as the brokers were then engaged in financing Italo and the McKeons later settled with Italo by delivering to it a block of stock of $125,000 market value. [Ex. 103; R. p. 330.]

Direction December 17, 1928 [Ex. 106; R. p. 332] to deliver 250,000 shares upon termination of the escrow to J. B. deMaria upon payment therefor for McKeon account of $200,000. Of this amount $50,000 was received by the escrow holder and paid to McKeon Drilling Co., which later made its own delivery to and adjustment with deMaria.

Directions December 22, 1928, to deliver stock at the termination of the escrow as follows:

To Maurice C. Meyers, 62,500 shares preferred, 62,500 shares common. [Ex. 74; R. p. 296.]

To J. M. Perata, 62,500 shares preferred, 62,500 shares common. [Ex. 108; R. p. 333.]

To Paul Masoni, 62,500 shares preferred, 62,500 shares common. [Ex. 105; R. p. 331.]

To J. V. Westbrook, 25,000 shares preferred, 25,000 shares common. [Ex. 107; R. p. 333.]

To E. Byron Siens, 30,036 shares preferred, 34,362 shares common. [Ex. 109; R. p. 333.]

To Fred Shingle, 961,510 shares common. [Ex. 110; R. p. 333.]

It was directed by McKeon Drilling Co. that when the foregoing stock should be delivered the escrow holder should secure from each recipient "a letter acknowledging receipt of such stock from us in consideration of services in organizing, financing or otherwise promoting the interest of the Italo Corporation of America."

Concerning the reasons for the foregoing language Robert McKeon testified [R. p. 1158] that McKeon Drilling Co. wanted some form of receipt that would satisfy the income tax department when it became nec-

essary to account for stock received and disbursed and he adopted the form prepared by counsel in obtaining a complete release from Frederic Vincent & Co. as shown in Exhibit H.H.H.

The directions contained in Exhibit 110; R. p. 333, *supra,* directed also the return to McKeon Drilling Co. on expiration of the escrow of the balance of its stock amounting to 1,860,573 shares of common and 309,110 shares of preferred.

All of the directions given, except as otherwise indicated above, were complied with and the attention of the court is especially called to the letter of accounting dated April 26, 1929, directed to McKeon Drilling Co. and signed by auditor L. J. Byers for Shingle, Brown & Co. [Exhibit 123; R. pp. 354-355-356.]

An examination and analysis of the orders given and the accounting made will show *that if any conspiracy did exist among other persons as charged in the indictment* whereby McKeon Drilling Co. was to receive only 2,000,000 shares of stock for its properties and 2,500,000 shares was to be distributed to other persons without consideration, such a conspiracy was not within the purview of Shingle, Brown & Co. as the escrow holder as far as any relation of the amount of stock ordered delivered without money consideration bears to 2,500,000 shares.

The stock so ordered issued without money consideration includes the Meyers, Perata, Masoni, Westbrook, Siens and Shingle stock, plus the 250,000 shares to Vincent without cash consideration, plus three-fourths of the 144,770 shares placed in Bank of Italy for sale to Vin-

cent with directions that three-fourths of the proceeds should be paid to Siens, Wilkes and Shingle, Brown & Co. This amounts to a total of 1,809,486 shares, including 1,388,674 shares of common stock and 420,812 shares of preferred stock.

Concerning the stock ordered to be delivered to Shingle, its purpose, consideration and disposition, further reference will be made.

Brown testified [R. pp. 995-996] that he was given the foregoing orders, dated December 22, 1928, on the day they were made at Los Angeles and was told the reasons for them—that Perata and Masoni were given stock because they were being moved out of official positions which they had long held and their good will with a large group of Italian stockholders was sought in connection with John McKeon's plans to build a larger oil operation; that the Westbrook stock was a personal matter between John McKeon and Westbrook; that Meyers' stock was in appreciation for his services as an attorney beyond any means of cash compensation; that Siens' stock had to do with personal relations of Siens and John McKeon who were partners in some large real estate transactions and in a horse breeding farm.

Brown also testified [R. p. 997] that the receipt of the orders was the first information he had of such intended distribution.

That the reasons for such distributions as told Brown at the time the orders were given were the reasons in the mind of John McKeon is testified at considerable length by Mr. McKeon [R. pp. 1219-1226] to the effect that

Perata and Masoni were given stock to hold their good will and that of a large body of Italian stockholders in respect to the proposed expansion of Italo, that stock and money delivered to Siens were to finance John McKeon's San Bernardino building operations and not for Siens' personal benefit and that Meyers was given stock for his work at the suggestion of Robert McKeon. He further testified [R. pp. 1242-1244] concerning the stock delivered to Westbrook as a guarantee of a settlement of a money controversy between Westbrook and Siens, which was confirmed by Westbrook. [R. pp. 800-801.]

In a letter written March 11, 1929 [Exhibit 116; R. p. 336] to Shingle, Brown & Co., Robert McKeon complains of a bill for $954.94 for revenue stamp transfer charges, encloses a check for $400 "in payment for the revenue stamps on the 2,000,000 shares that were actually received by the McKeon Drilling Co." and adds "as you are aware the balance of the stock was placed in the name of the McKeon Drilling Co. only for the convenience of other interested parties. Each party interested should pay for the stamps used on that proportion of the stock which he received."

The statement in the letter 2,000,000 shares received by McKeon Drilling Co. bears no comparable relation to the directions given the escrow holder for disposition of stock and the accounting therefor in Exhibit 123 [R. pp. 354-355-356] and Shingle without reading its contents ordered the payment to settle a controversy, which had been going

on for some time between Byers as auditor for Shingle, Brown & Co. and Thackaberry as secretary of McKeon Drilling Co. See Exhibits 111, 115, 116 and 117. On this matter Shingle testified:

> "With respects to Exhibit 111, 115, 116 and 117, I have seen those letters before. They refer to expenses on stamp taxes for stamps on the McKeon stock and the amount of the bill was some nine hundred odd dollars, and the reference to the stock being transferred was the transfer from the McKeon escrow stock in accordance with the request that Horace Brown brought to me in December. On March 11, 1929, the date of Exhibit 116, Horace Brown was not in San Francisco. I wrote 'O. K., F. S.' on Exhibit 116. The circumstances of the receipt of Exhibit 116 and my putting 'O. K., F. S.' on there are as follows: There had been a controversy between Bob McKeon and our office over the stamps. I knew of the existence of those letters, and one day Mr. Byers came into my office and told me that he had just received a check from the McKeon Drilling Company for a part of those stamp taxes, and that they were still complaining that they should not pay them all, so he told me the amount in dispute was around about $500, and I said, 'All right, O. K., go ahead and pay it,' and I remember putting that on there. I do not have any recollection of reading the letter. The first time I recall seeing it was when it was put in evidence here. I know nothing now and did not know anything about the representation or the contents of that letter other than the fact that it recited a remittance of $400, and kicking about the balance of it when I O. K.'d it." [R. pp. 925-926.]

Brown testified regarding this matter:

> "I never saw Exhibit 116 until it appeared in the court room. I did not have any knowledge or information in March, 1929, that the McKeon Drilling Company stock, amounting to 2,500,000 shares, had been distributed to other persons. On the contrary, it was around 2,000,000 shares or less, as far as our escrow instructions went." [R. p. 1012.]

Robert McKeon testified at considerable length concerning his reasons for writing the letter and the language adopted by him therein [R. pp. 1153-1156] to which attention is respectfully called.

Shingle-Brown Compensation.

In respect to the 961,510 shares of common stock directed to be delivered to Fred Shingle upon termination of the escrow, Brown was advised when handed the order upon Shingle, Brown & Co., that the stock was to be placed at the direction of A. G. Wilkes to be used by him for compensating Shingle, Brown & Co. and for further use by him in working out John McKeon's plans for a larger oil company. Upon receipt of the instructions Shingle consulted with Wilkes and was told that the latter intended to use some 112,500 shares to keep Vice-President Gordon interested in the new company and for Howard Shores and that thereafter Shingle should keep half of the stock and Wilkes would use the other half. Shingle thereupon reduced the understanding to writing [Exhibit 110; R. p. 344] and at the termination of the escrow received for himself and the members of his firm approximately 450,000 shares of common stock.

It will be remembered that Shingle and Brown are not charged in the indictment and are in fact specifically excluded from any charge that they participated in any secret agreement relating to the issuance of the McKeon stock. That Shingle and his firm gave valid consideration for the stock received by Shingle is affirmatively shown by the record and stands undisputed by any evidence therein.

With a desire to repeat as little as possible facts set forth in the McKeon brief it will be necessary to go back to the period immediately following September 20, 1928, when Frederic Vincent & Co. having fallen down on their contract to provide funds, $600,000 was borrowed by Shingle, Lacy, John McKeon and others to meet a crisis in Italo financing and Shingle and Brown were urged by John McKeon and Wilkes to devise means of saving the situation.

In this crisis John McKeon, who had guaranteed the payment of the $600,000 in notes and testified [R. pp. 1210-1211] that he felt responsible for around 75 per cent of the money in the syndicate told Brown [R. p. 986] "if we could do so he would see we were not sorry for it," and that Wilkes also joined in such assurance, concerning which Brown testified:

> "Our conversations with Mr. Wilkes were along the same lines, asking us if we would get together on this thing. He said if we would he would see that we were substantially rewarded somewhere along the line for our services, if we could pull this thing through." [R. p. 989.]

On this subject Shingle testified:

> "Prior to that time Wilkes told us that if we would get into the matter he would see that we would be compensated, so that we had that assurance from both John McKeon and Wilkes." [R. p. 911.]

Confirming this fact John McKeon testified:

> "Shortly prior to October 16, 1928, at the time I told Wilkes to settle with Vincent, I also told him to use what stock was necessary to get stronger financial firms in to handle the situation. I told him I would go on that as far as we had to go to get that support." [R. p. 1216.]

Wilkes testified:

> "About the time the brokers agreed to take on the financing of the company, Jack McKeon told me that I could tell Shingle and Brown that if they took hold of the situation and cleaned it up and got these properties paid for and got the company in financial shape and raised the three and a half million dollars that was necessary that he would see that they got some compensation." [R. p. 735.]

And in connection with his testimony that he and his brother Raleigh had agreed to permit John McKeon to use stock received by McKeon Drilling Co. for various purposes, Robert McKeon testified:

> "With reference to reimbursing Shingle-Brown for their efforts which had been made and were to be made in regard to this other financing, I don't believe at that time there had been any definite amount of stock agreed up(on) at least I have not heard of any definite amount. To some extent they were to receive some of the stock." [R. pp. 1147-1148.]

While it was agreed by all persons testifying in relation thereto that no definite amount of compensation had been agreed upon it is clear that such assurances were given and that Shingle and Brown did organize the brokers' pool which carried the syndicate financing of Italo to a conclusion.

At about this time John McKeon and Wilkes were laying plans for the further expansion of Italo to include other large producing companies to be financed by eastern capital which Wilkes had contacted in New York during his visit in August and September and John McKeon who was preparing to leave Richfield was to head the consolidated corporation. John McKeon thereupon made arrangements with his brothers, Robert and Raleigh, to use up to 2,500,000 shares of Italo stock belonging to McKeon Drilling Co. in any manner he saw fit to advance his plans. [R. p. 1147.]

Shingle and Brown at this time were called upon for further services in connection with this proposed financing. Shingle testified [R. pp. 918-919] that the subject was first called to his attention late in October or November, 1928, when a Mr. De Shadney, representing eastern financial interests, came to the coast to examine into the proposed transaction. The deal contemplated the acquisition of various important properties aggregating about $30,000,000 and as a part of the financing it was proposed to issue $10,000,000 of bonds of which it was essential that western brokers should handle half but without participation in a stock bonus which the eastern underwriters expected to exact. Shingle and Brown agreed to handle $5,000,000 of the bonds, as confirmed by their own testimony, that of Wilkes [R. p. 736] and John

McKeon [R. p. 1235]. Discussions of plans concerning the formation of the larger company continued through several months, Shingle and Brown taking a part therein and maintaining their agreement to assist in the financing.

The first compensation received by Shingle, Brown & Co. was December 14, 1928, when McKeon Drilling Co., having received a check for $86,310.40 from the sale of a block of stock to Frederic Vincent & Co., gave them a check for one-fourth the amount, concerning which Brown testified [R. p. 1003] he was told by Robert McKeon it was a part of his appreciation for what Shingle, Brown & Co. had accomplished.

The syndicate, through the efforts of Shingle and Brown in organizing the brokers' pools, settled its obligations to Italo under its stock purchase contract December 20, 1928, and on December 22, 1928, Brown was given the instruction of the McKeons regarding the 961,510 shares to be placed at the disposition of Wilkes. Shingle [R. pp. 919-920] testified that in respect to this stock Wilkes told him it was to be employed where he thought best to further the big deal which he believed to be near consummation and that his division of the stock with Shingle was for what Shingle had done in the financing of Italo through the brokers' pools and for his commitment to take $5,000,000 bonds of the proposed new company.

Brown testified [R. pp. 1004-1005-1006] that the McKeons had told him this block of stock was to be placed at the direction of Wilkes to be used by him in compensating Shingle, Brown & Co. and in forwarding the McKeon Oil Co. picture; that in arranging a division of the stock Wilkes "told us at the time that the stock was

in compensation for the services we had performed in getting this deal through when it looked very bad and also for and standing in line for the larger picture" and further testified:

> "I had had no prior definite arrangement with any one of the McKeons or Mr. Wilkes that we were to receive any definite amount of compensation for the services Shingle, Brown & Company rendered in connection with straightening out the financial matters of the Italo Petroleum Corporation of America. At the time of this conversation with Mr. Wilkes, we had already agreed with Mr. De Shadney, Mr. Pass and given Mr. Wilkes our assurance that we would stand by on the bond financing of the eastern picture, which they had told us might run as high as ten million dollars, and we would be expected to handle about half of it on the coast. I considered that the stock which we received from the McKeons was compensation for what we had done in the past and what we were to do in the future. I considered the compensation very substantial, but it represented about ten per cent of the McKeon Drilling Company's stock, which I did not consider an excessive cut in consideration of what we had done and were prepared to do." [R. pp. 1005-1006.]

John McKeon, who directed the disposition of the stock, testified:

> "With reference to the entries on Exhibit 297 showing approximately 450,000 shares of common stock going to Shingle, Brown & Company out of the McKeon escrowed stock, *I figured that Shingle, Brown & Company were very well entitled to it, because I realized that if it had not been for the assistance of Brown and Shingle in September or early*

in October that our whole project would have collapsed, and I realized at that time that Italo stock, unless the financial program was worked out, wasn't worth anything, that it would be selling for ten cents a share or less I realized all of those things at the time I agreed to give them the stock. That was at the time I agreed to use the stock and settle with Vincent. I agreed to it as an inducement to the other brokers. There was no specification as to the amount of stock they were to receive, and we all figured that it would be a very hard job, and nobody contemplated that the money would come into the syndicate and that the sale of stock would be as rapid as it was. We contemplated that we had a year's or a half year's work ahead, and they completed it in approximately sixty days. That was after the company was reorganized and Mr. Lacy put in and the stock went overnight.

"I also knew in December, 1928, that Shingle, Brown & Company had verbally agreed that they would finance one-half of the $10,000,000 bond issue that was then proposed and that agreement was all made and entered into before I decided how much stock I was giving them." [R. pp. 1234-1235.]

The projected eastern deal made further progress and Shingle and Brown kept in touch with it. Early in 1929 the proposed deal, called for cash requirements of $15,500,000 and stock to the amount of $19,750,000 as indicated by a telegram sent to Palmer & Co. [Exhibit R. R.; R. pp. 1007-1008.] This was followed by a visit to the coast of a Mr. Lyons representing Palmer & Co. to whom Shingle and Brown offered their further pledge

to handle $5,000,000 bonds of the new company and concerning which Brown testified:

> "Mr. Lyons had told me in the presence of Jack McKeon and A. G. Wilkes in Los Angeles that there was no question at all about the deal going through, and Jack McKeon was going east with him and it would be closed up very quickly. He indicated the amount of the bond issue would be determined, that they would handle $10,000,000 in bonds, and I told him we could handle about half of them on the coast.
>
> "With respect to Shingle, Brown & Company receiving any portion of the stock bonus that was to be issued to the eastern bankers for the financing of the bond issue, I told him I presumed the eastern bankers would want the stock bonus. I asked him if we would have any interest in that and he said no, that the eastern bankers would handle that entirely back there, that we could handle some of the bonds. We had already been compensated and I said we would do so to the limit of our ability.
>
> "In order to get in a financial position to handle these bonds we sold stock over a period of three months ourselves, a few thousand shares at a time so as not to disturb the market, and placed ourselves in a financial position to handle the bonds." [R. p. 1010.]

Shingle [R. pp. 920-921-922] also testified at length regarding the further progress of the eastern deal, the continued commitment of his firm to take $5,000,000 bonds, and the sale over a period of the stock received by him in order to get in a position to carry them.

For reasons connected with increasingly critical times leading up to the market crash of the fall of 1929 the projected deal was not consummated and Shingle testified:

> "The McKeon deal did not go through and we didn't give back the 450,000 shares because we had performed a pretty good service and saved this company once, and I think that compensation was given to us for that, probably more or as much anyway as standing by and helping finance in the future. We would expect pay for something we did and we didn't get paid until after we had done the job." [R. p. 935.]

It appears from the record that from all transactions hereinabove stated Shingle, Brown & Co. received $578,-260.03 which government accountant Goshorn described on his charts and in his testimony as bonus as without consideration and as net income. In cross-examining Goshorn, counsel for Shingle and Brown, asked:

> "Now, do you know from an examination of any of these books and records in evidence that during the year 1929 that the detailed earnings of Shingle-Brown were $1,229,692.09; that after deducting their expenses, operating expenses and other expenses, it left a net profit for that year of $397,840.29." [R. p. 664.]

The government counsel objected and the court refused to permit cross-examination tending to show the value of services performed as to expense incurred by Shingle, Brown & Co. in gaining such compensation. [R. pp. 664-670.]

In cross-examinination of Goshorn, recalled by the government as a rebuttal witness [R. pp. 1255-1256], coun-

sel for Shingle and Brown again endeavored to bring out that the transactions were part of many large business operations of Shingle, Brown & Co. in the year 1929 and did not reflect net profit to which the court sustained the objection of government counsel.

Twelfth Count Letter.

As previously stated Shingle and Brown were both convicted only on count 12 of the indictment which alleges that, for the purpose of executing a scheme and device to defraud Italo and its stockholders, *Shingle mailed a letter at San Francisco* addressed to O. J. Rohde.

In considering what part this letter could possibly play in the execution of any scheme or device whatever, *it must be recalled that Shingle and Brown are clearly excluded in the charges contained in the indictment and bill of particulars with any participation in the transaction by which McKeon Drilling Co. sold its properties to Italo at an alleged excessive price and subject to a secret agreement to divide a portion of the proceeds with those who caused the transaction. They were acquitted by the jury on the 15th count which generally charges a conspiracy in relation to the distribution of the McKeon stock.*

The relation of the syndicate to Italo is shown by the evidence, which is undisputed, to be that of a purchaser of a block of Italo's stock, bought and paid for at a fair net price, the syndicate in every way performing its obligation to Italo, If, as charged, and as fully supported by evidence, Shingle and Brown had no part in devising the McKeon transaction the syndicate could not have been a part of such a scheme as far as they were concerned.

The syndicate completed its payments to and received a complete acquittance of its obligations from Italo December 20th, 1928, and on that date became the owner and holder of all the unsold stock placed in escrow subject to the fulfillment of such obligations. Thereafter the syndicate was simply a stockholder of Italo, accountable only to its members and to no other person, firm or corporation.

The letter of Shingle to Rohde, a member of the syndicate, is dated January 23, 1929, *a month after the conclusion of the syndicate's business with Italo,* and in full is as follows:

"Dear Mr. Rohde:

"In reference to your participation in the Italo Syndicate, it is impossible at this time to state definitely when you can be paid out in full, but I am liquidating as fast as the market will warrant, and am in hopes that everything can be accomplished before many more months pass.

"As regards profit in the deal, this also is hard to estimate until further liquidation is accomplished.

"As soon as anything transpires of interest to participants I will immediately advise you.

"Very truly yours,

"FRED SHINGLE,
"Syndicate Manager."

[R. p. 581.]

This letter is in reply to a letter from Rohde to Shingle dated December 29, 1928, in which Rohde acknowledges receipt of the repayment of a portion of his subscription and inquires when further payments will be made. [Exhibit 288; R. p. 580.]

Shingle's letter contains no representations whatever concerning Italo *and relates entirely to the business affairs of the syndicate with a syndicate member.*

Witness Rohde testified [R. pp. 577-583] that he subscribed $5000 to the syndicate at the suggestion of E. Byron Siens. He received a receipt therefor and a copy of the Syndicate Agreement. He received a letter dated December 21, 1928, signed Fred Shingle, Syndicate Manager, by L. J. Byers, stating that the syndicate had discharged its entire obligation to Italo, enclosing a check for $1750, and advising him further funds would be forwarded when available. [Exhibit 288; R. pp. 580-581.] To this letter Rohde replied, making the inquiry which prompted Shingle's reply in the form recited.

Dated January 31, 1929, and March 7, 1929, Rohde received form letters enclosing further cash distributions to members of the syndicate. [Exhibit 289-290; R. p. 582.]

Dated July 10, 1929, Rohde received a form letter signed Fred Shingle, Syndicate Manager, by Horace J. Brown, extending the term of the syndicate, which is the

letter set forth in the 13th count of the indictment upon which appellants were acquitted.

Dated January 4, 1930, Rohde received a letter advising him of the conclusion of the syndicate, enclosing a copy of an audit of the syndicate affairs by Lybrand, Ross Bros. & Montgomery, and pursuant to its instructions called at the Farmers & Merchants Bank and received an additional cash distribution and his ratable share of the Italo stock held by the syndicate.

There is nothing in witness Rohde's testimony of criticism or complaint of the conduct of the syndicate and nothing to show that anything concerning it was misrepresented to him. He testified that he went into the syndicate thinking he would profit thereby.

None of the seventy-odd subscribers to the syndicate were produced by the government to complain of the conduct of the syndicate or to impugn the motives of Shingle, its manager. *The indictment does not allege any scheme to defraud syndicate members, but merely that the syndicate members, of which Rohde was one, were guilty of fraud because they expected to make a profit from syndicate operations.*

In what manner the letter written by Shingle to Rohde, exclusively concerning syndicate affairs and made the subject of count 12 on which both Shingle and Brown were convicted, could have been mailed to execute a scheme and artifice to defraud Italo and its stockholders does not appear from the evidence.

Officers and directors of Italo who were subscribers to the syndicate included Perata, Masoni, Siens, Gordon, Lacy, De Maria, Rolandelli, Tomassini, Pizzi, De Pauli, Quillici, Keeler, Chapin and Stewart.

Although the indictment charges the syndicate *as a part of a scheme to defraud Italo* and specifically refers to the connection therewith of officers and directors of the corporation, it should be observed that directors Gordon, Lacy, Rolandelli, Pizzi, De Pauli, Quillici, Keller, Chapin and Stewart were not indicted; that deMaria was dismissed at the conclusion of the government case on motion of the government; that Tomassini was dismissed by order of the court at the conclusion of the defense case and that Perata and Masoni were convicted only on the 15th or conspiracy count.

In view of these facts it does not appear that the syndicate operation was considered by either court or jury as a part of any scheme to defraud and further supports the contention of appellants Shingle and Brown as shown by the record that a letter written by Shingle alone solely in reference to the affairs of the syndicate and made the basis of count 12 upon which both Shingle and Brown were convicted could not have been in execution of any scheme or device to defraud.

SPECIFICATION OF ERRORS

I.

The court erred in overruling appellants' demurrer to and in denying their motions for directed verdicts of not guilty and that judgment be arrested upon the twelfth count of the indictment, made upon the ground that the twelfth count did not allege facts sufficient to constitute a public offense within the jurisdiction of the United States District Court for the Southern District of California.

This specification of error is based upon the error of the court in overruling appellants' demurrer to the twelfth count [Assignment of Errors Nos. 1, 5 and 6, R. pp. 1391 to 1392 and R. p. 138], in denying appellants' motion for a directed verdict of not guilty [A. E. 17, R. p. 1403 and R. p. 690] and in denying appellants' motion in arrest of judgment [A. E. 14 and 15, R. pp. 1357 and 1403].

II.

The court erred in instructing the jury that appellants could be convicted under the twelfth count of the indictment by finding "that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described placed in the United States Post Office in San Francisco, a postpaid envelope addressed to O. J. Rohde at Los Angeles, California, containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234." (A. E. 99.) [R. pp. 1531-2.]

III.

The court erred in instructing the jury "that the person guilty of its violation must first devise or intend to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises, and secondly, for the purpose of execution such scheme or artifice or attempting so to do, place or caused to be placed any letters, circulars, or advertisements in the post office to be sent or delivered by the post office establishment." [R. p. 1280.]

IV.

The court erred in instructing the jury as follows: If you find from the testimony introduced in this case that the letters in question passed through the mail, and that they were placed in the mails by the agents or clerk of the defendants, acting within the scope of their employment and in the usual course of business, the defendants caused the letters to be placed in the post office to be sent or delivered, within the meaning of the mail fraud statutes. [A. E. 102; R. pp. 1533-1534. Exceptions p. 1327.]

V.

The court erred in admitting in evidence against appellants Shingle and Brown, over their objections and in violation of the allegations of the indictment and the bill of particulars, the testimony of the witness Goshorn, the summary prepared by him, Exhibit No. 297, and the books and records upon which said testimony and exhibits were based for the purpose of proving that these appellants were parties to an alleged "secret arrangement and agreement" to receive as "secret profits" a part of the stock consideration paid by Italo for the McKeon Company's assets and the proceeds from the sale of said stock.

This specification of error is based upon Assignments of Error Nos. 47, 47-a, 47-b, 47-c, 47-d; R. pp. 1447 to 1460, the evidence being contained in the Bill of Exceptions, R. pp. 589-608.

VI.

The court erred in failing and refusing to instruct the jury, as requested by appellants Shingle and Brown, that the jury was not to consider any evidence as proving that said appellants had knowledge of or participated in transactions when they were excluded from such participation in the indictment and bill of particulars.

This specification of error is based upon the refusal of the court to give a series of instructions requested by appellants Shingle and Brown with respect (1) to the nature and effect of the bill of particulars as restricting the proof of the government, and (2) to the consideration

of evidence with respect to appellants as to transactions and those "parts" of the scheme to defraud when the indictment and bill of particulars specifically excluded them from knowledge of or participation therein.

All of said requested instructions were refused and exceptions taken. [R. p. 1304.] Such refusals are the basis of the following Assignments of Error:

1. Requested instructions as to general effect of Bill of Particulars. (Assignment of Error No. 70.) [R. pp. 1404-5.]

2. Requested instructions to the effect that Shingle and Brown were excluded from participation in organization of Italo-American and Italo-Pete and the control of said corporations. (Assignments of Error Nos. 71, 72, 73.) R. pp. 1505-7.]

3. No evidence that Shingle and Brown received a bonus from Italo-Pete for participating in the $80,000 loan. (Assignment of Error No. 74.) [R. p. 1507.]

4. Shingle and Brown excluded from causing the execution of the Italo-Brownmoor contract and issuance of stock for the Brownmoor assets. (Assignments of Error Nos. 75, 76 and 77, 78.) [R. pp. 1507-1510.]

5. Shingle and Brown excluded in indictment and bill of particulars from participation in the purchase by Italo of the McKeon assets, viz.:

   (a) Did not cause execution of Italo-McKeon contract. (A. E. No. 79.) [R. p. 1511.]

   (b) No dealings with the Corporation Commissioner. (A. E. No. 80.) [R. pp. 1511-1512.]

(c) Shingle and Brown not parties to "secret arrangement and agreement" for distribution among defendants of 2,500,000 shares of stock received by McKeon Company from Italo. (Assignment of Error No. 36.) [R. p. 1435.] [R. pp. 319-321.] (Assignments of Error Nos. 81 and 82.) [R. pp. 1513-1514.]

(d) No participation by Shingle and Brown in receiving, selling, or profiting from sale of stock "received . . . under said secret arrangement and agreement." (Assignment of Error No. 83.) [R. p. 1514.]

The instructions with respect to the effect of the bill of particulars on the indictment which were requested, refused and exceptions taken [R. 1304-1313] and which are hereinabove referred to and epitomized are as follows:

[A. E. 70; R. 1504]: "You are instructed that a bill of particulars has been furnished to the defendants in this case, by order of this court. The purpose of a bill of particulars is to advise the court, and more particularly the defendants, of what facts, in more or less detail, the defendants will be required to meet upon the trial of a case, and the Government is limited in its evidence to those facts so set forth in the bill of particulars, as having been done or committed by any particular defendant. When furnished a bill of particulars it concludes the rights of all parties to be affected by it, and the Government in this case must be and is confined to the particulars they have specified in the bill of particulars as having been done or said by any of the particular defendants. The mere fact, however, that the Gov-

ernment states in the bill of particulars that any particular defendant or defendants did engage in any of the transactions therein alleged is not to be considered by you as any evidence whatsoever that such defendant or defendants did engage in such transaction; but it must be proven by the evidence to your satisfaction beyond a reasonable doubt that such defendant did knowingly participate in such transaction.

However, the Government is limited and restricted in its evidence to the particulars specified in the bill of particulars and is not permitted to prove that any defendant or defendants not named in the bill of particulars as having engaged in a particular transaction did engage therein. In other words, the effect of the bill of particulars in this regard, is that the Government says that under the evidence the particular defendant did not engage in the particular transaction not specified as having been engaged in by him."

[A. E. 71; R. 1505]: "You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, had knowledge of, or participated in the organizing of the Italo American Petroleum Corporation, or participated in the issuing, or selling, of the capital stock of the said Italo American Petroleum Corporation."

[A. E. 72; R. 1506]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, organized, or caused the organization of, the Italo Petroleum Corporation of America, or that they issued, or caused to be issued, the capital stock of the said Italo Petroleum Corporation of America."

[A. E. 74; R. 1507]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, on or about May 16, 1928, loaned to the Italo Petroleum Corporation of America the sum of $80,000; nor is there any evidence that they, or either of them, received, from the Italo Petroleum Corporation of America, a bonus for the making of a loan of $80,000 to the said Italo Petroleum Corporation of America."

[A. E. 75; R. 1508]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement for the purchase of the assets of the Brownmoor Oil Company. There is no evidence that they knew what the terms or provisions were that were to be contained in any agreement between the said Italo Petroleum Corporation of America and the said Brownmoor Oil Company or what consideration the Italo Petroleum Corporation of America agreed to pay for the assets of the Brownmoor Oil Company."

[A. E. 76; R. 1508]: "You are instructed that there is no evidence in this case that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, at any time filed or caused to be filed with the Corporation Commissioner of the State of California any application or applications for a permit or permits for the issuance to the Brownmoor Oil Company, or the stockholders of the Brownmoor Oil Company, of any of the stock of the Italo Petroleum Corporation of America, agreed by the Italo Petroleum Corporation of America to be paid by it as a part of the purchase price of the assets of

the Brownmoor Oil Company. There is no evidence that they, or either or any of them, had knowledge of, or participated in, any of the transactions had between the Italo Petroleum Corporation of America, and the Brownmoor Oil Company, or between either of said corporations and the Corporation Commissioner of the State of California respecting the purchase by the Italo Petroleum Corporation of America of the assets of the Brownmoor Oil Company."

[A. E. 77; R. 1509]: "That there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were directors of the Italo Petroleum Corporation of America, or that they caused the Italo Petroleum Corporation of America to enter into an agreement with the Brownmoor Oil Company providing for the purchase of the assets of the Brownmoor Oil Company by the Italo Petroleum Corporation of America or that they caused the Italo Petroleum Corporation of America to issue 600,000 shares of its preferred or 600,000 shares of its common capital stock as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company; or that they filed or caused to be filed with the Commissioner of Corporations of the State of California, an application for a permit to issue said 600,000 shares of the preferred or, 600,000 shares of the common capital stock of the said Italo Petroleum Corporation of America, as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company."

[A. E. 79; R. 1511]: "There is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the

defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement with the McKeon Drilling Co., Inc., by the terms of which the Italo Petroleum Corporation of America agreed to purchase or did purchase certain assets of the McKeon Drilling Co., Inc., or that they or either of them caused said agreement to provide that an excessive consideration should be paid for said assets; or that they caused the issuance of, or the delivery to, the McKeon Drilling Co., Inc., of 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration to be paid for said assets of the McKeon Drilling Co., Inc."

[A. E. 80; R. 1512]: "You are instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did apply to the Commissioner of Corporations of the State of California for a permit to issue stock of the Italo Petroleum Corporation of America for the purpose of acquiring or purchasing the properties of various companies, including the properties of the McKeon Drilling Co., Inc.; there is no evidence that they, or either or any of them, should, or that they did, represent to the Commissioner of Corporations of the State of California in making said application, that the Italo Petroleum Corporation of America, had made an agreement with the McKeon Drilling Co., Inc., to issue or deliver to the McKeon Drilling Co., Inc., 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the purchase price to be paid by it for the said properties of the McKeon Drilling

Co., Inc.; there is no evidence that defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them at the time said application was filed with the Corporation Commissioner of the State of California, knew or intended that the McKeon Drilling Co., Inc., should or that it did receive only 2,000,000 shares of the said stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for the assets of the McKeon Drilling Co., Inc."

[A. E. 81; R. 1513]: "You are further instructed, in accordance with the foregoing rules respecting the effect of bills of particulars, that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, had any secret arrangement or agreement either among themselves or with any of the other defendants whereby they or any of the defendants, were to receive back, or did receive back, from the McKeon Drilling Co., Inc., 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America, issued by that company as a part of the purchase price for certain assets of the McKeon Drilling Co., Inc., either without the knowledge or consent of the stockholders of the Italo Petroleum Corporation of America, or without giving any consideration therefor."

[A. E. 82; R. 1514]: "You are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were parties to or had knowledge of any secret arrangement or agreement, if any there was,

whereby any defendant in this case was to receive back from the McKeon Drilling Co., Inc., all or any part of the 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for certain assets of the McKeon Drilling Co., Inc."

[A. E. 83; R. 1514]: "In accordance with the rules stated to you with respect to the effect of bills of particulars, you are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did sell, or cause to be sold to some of the persons designated in the indictment, as the persons to be defrauded, any stock of the Italo Petroleum Corporation of America, received by them from the McKeon Drilling Co., Inc.; or that any such stock was sold by them, if any was sold, was sold pursuant to any secret arrangement or agreement to which they were parties or of which they had knowledge."

[A. E. 84; R. 1515]: "You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, sold or caused the selling of any stock issued by the Italo Petroleum Corporation of America as the result of any secret arrangement or agreement, of which they had knowledge, or to which they were parties. The mere fact that the said defendants may have received some of the shares

of stock issued by the Italo Petroleum Corporation of America as part of the purchase price paid by it for the assets of the McKeon Drilling Co., Inc., creates no presumption that it was issued to the said Fred Shingle, or Horace J. Brown, or Axton F. Jones, or that it was received by them, pursuant to any secret arrangement or agreement. You are instructed that there is no presumption that written instruments are without consideration. On the contrary, the law presumes that all parties are honest, that the usual course of business has been followed, and that a written instrument was executed for a valuable consideration, and that it is free from fraud."

VII.

The court erred in admitting in evidence against appellants Shingle and Brown, over their objections and motions to strike, the books and records of the Brownmoor Oil Company, the Italo-American Petroleum Corporation, the Italo Petroleum Corporation of America, McKeon Drilling Co. Inc. and John McKeon, Incorporated, of Lieb, Keystone and Bacon & Brayton, and International Securities Company, and the testimony and summaries Exhibits Nos. 297, 298 and 299 of the witness Goshorn based on such records.

This specification of error is based on the following numbered Assignments of Errors, the record page reference to the testimony, objections and motions to strike, being as hereinafter set forth.

1. **Brownmoor Records.**

(Assignment of Error No. 38.) [R. p. 1437.]

(Assignment of Error No. 43.) [R. p. 1444.]

Referring to the books of account being Exhibits 32-a and b and 147. [R. pp. 468 and 469; 368 and 650.] With objection interposed thereto and the ruling and exception [R. pp. 469 and 650] and the motion to strike, denial thereof and exception appearing at R. pp. 686 and 689, and minute book of said company, Exhibit 239, received over objection and exception. [R. pp. 560 and 561.]

The foundation evidence for the introduction of these records appears in the testimony of the witness Francis King. [R. pp. 467-469.]

2. **Records of Italo-American Petroleum Corporation.**

(Assignments of Error Nos. 23 and 24) [R. pp. 1404-1407] relating to Exhibit 3.

Minute Books, the objections thereto and rulings thereon. [R. pp. 191 and 192.]

Books of Account. Being Exhibits 5, 6, 8, 9, with the foundation testimony with respect thereto and the objections and rulings thereon appearing at R. pp. 198 to 202.

The foundation testimony for the admission of these exhibits was given by Courtney Moore, a director of the company [R. p. 197] and the bookkeeper, Ida M. Scat-

trini [R. pp. 198-203] and Emma Baldocchi [R. pp. 203-208].

The government accountant, James H. Hynes, testified with respect to the contents of these exhibits [R. pp. 191-208].

3. **Records of Italo Petroleum Corporation of America.**

(Assignment of Error No. 27.) [R. pp. 1410-1419.]

(Assignment of Error No. 28.) [R. pp. 1419-1423.]

Minute Books, Exhibits 16-A, B and C. [R. pp. 221-6.]

Objections and ruling [R. pp. 222-27] and motion to strike and ruling. [R. p. 236.]

Book of Account, Exhibits 28-A, B, C and D and 29, 31 and 33. [R. pp. 255-261.]

Objections and ruling. [R. pp. 261-264.]

Testimony of identifying witnesses to Minute Books, Robert McLachlin. [R. pp. 220-253.]

Books of account identified by the witnesses J. H. Jefferson [R. pp. 254-5]; J. S. Human [R. pp. 255-260]; I. V. Davis [R. pp. 260-265]; Ada B. Lyle [R. pp. 265-266, 283-301]; Ralph J. Sunderhauf [R. pp. 267-280.]

4. **McKeon Drilling Co. Records.**

Exhibits 86-a, b, c and d, 87-a and b, 89, 90, 91, 94.

(Assignment of Error No. 32.) [R. p. 1429.]

(Assignment of Error No. 33.) [R. p. 1431.]

Assignments of Error No. 34 and 35.) [R. pp. 1433-1435.]

Identifying witnesses, David C. Taylor [R. pp. 308-319]; E. A. Thackaberry [R. pp. 321-327].

Objections and ruling. [R. pp. 308, 309, 310, 314, 315.]

Motion to strike and limit testimony. [R. pp. 319, 320.]

Further objections and ruling. [R. pp. 323, 325, 333, 338, 339.]

5. **Records of Bacon & Brayton and Lieb, Keystone.**

(Assignment of Error No. 30.) [R. p. 124.]
(Exhibit 58.)

Objections and ruling. [R. p. 284.]

6. **Books and Records of John McKeon, Inc., a Corporation.**

(Assignment of Error No. 39.) [R. pp. 1438-39.]

(Exhibits 245-a, b and c.)

Objections and ruling. [R. pp. 479-481.]

7. **Books and Records of International Securities Co.**

(Exhibits Nos. 242 and 243.)

Objections and ruling. [R. p. 477.]

8. **Exhibits Nos. 297, 298 and 299 Are Testimony of the Witness Goshorn.**

Exhibit No. 297. (Assignment of Error No. 47.) [R. pp. 1447-1453.]

Objections and ruling. [R. pp. 589-608.]

Exhibit No. 298. (Assignment of Error No. 50.) [R. pp. 1468-1469.]

Objections and ruling. [R. pp. 631-633.]

Exhibit No. 299. (Assignment of Error No. 51.) [R. pp. 1471-1473.]

Objections and ruling. [R. pp. 634-641.]

Lengthy objections were interposed to the admission in evidence of the above described exhibits and testimony on the grounds that said records were incompetent, irrelevant, immaterial and hearsay, no proper foundation laid, not binding upon these appellants, and that the said books and records being books and records of corporations of which these appellants were not officers and directors; and there being no proof that they had knowledge of the entries therein, or access to said books and records, and they would not be binding on said appellants.

VIII.

The court erred in sending Exhibits Nos. 297, 299 and 155 to the jury room to be considered by the jury during its deliberations over appellants' objections that said exhibits contained matters that had not been received in evidence, which said matters should be deleted from said exhibits before the same were taken to the said jury room, and the said jury therefore received evidence out of court.

This specification of error is based upon the following assignments of error: Nos. 57 and 52, R. 1485 and 1474.

During the trial Exhibit No. 155, which purported to be a statement made by the defendant James V. Westbrook (who was acquitted) to officers of the Internal Revenue Bureau (respecting the income tax liability of appellant E. B. Siens), was received in evidence. The statement was made on or about November 12, 1929, after the termination of the alleged scheme and conspiracy and was therefore admitted as to the defendant Westbrook only. [R. pp. 435-6.] The statement was twelve pages in length and only that portion beginning on page one and ending on page eight with the words "Not that I know of" was received in evidence and read to the jury and the remainder thereof was stricken from evidence. [R. p. 436.] The portion of said exhibit ordered stricken from evidence is contained in the record [R. pp. 1335-1340] and relates to an alleged proposal by the defendant Siens to evade the payment of income taxes [R. pp. 1337-

1339], to the alleged building of a $100,000 yacht by the defendants Siens and Wilkes [R. p. 1336] and to the making of "large profits" by the "Shingle Syndicate." [R. p. 1339.]

Exhibits 297 and 299 were two large charts of dimensions of about 5 x 10 feet each. They purported to show the distribution of "bonus stock" issued by Italo Petroleum Corporation of America in acquiring the assets of the McKeon Drilling Company and the "realization" of the various defendants from this "bonus stock." It appeared on *voir dire* examination that none of the books and records in evidence described this stock as "bonus stock" [R. pp. 601-603] and the court ordered the word "bonus" stricken from said exhibits. [R. pp. 601-603; 629; 640-641.] However, the word "bonus" was not deleted from said exhibits. [R. pp. 595-598; 636-639.]

After the jury retired to deliberate upon its verdict the jury requested the court to send, and the court did send, Exhibits 155, 297 and 299 to the jury room without deleting therefrom those portions of Exhibit 155 which had been stricken from evidence, or the word "bonus" appearing on Exhibits 297 and 299, although appellants called said matters to the attention of the court and objected to said Exhibits being taken to the jury room without said matters being deleted therefrom. [R. p. 1335.] The objections interposed by appellants to these exhibits being taken to the jury room were overruled and exception taken. [R. pp. 1335, 1340.]

IX.

The court erred in refusing to permit cross-examination of the witness Goshorn with respect to his testimony to the effect that the stock and money alleged to have been "realized" by these appellants was "realized" without consideration and was net profit.

This specification of error is based upon Assignments of Error Nos. 49 and 68. [R. pp. 1462 and 1501.]

The government accountant Goshorn prepared Exhibit No. 297, purporting to be a "summary showing disposition of 3,500,000 shares of common stock and 1,000,000 shares of preferred stock 'Italo Petroleum Corporation of America' (per books and records) issued in acquiring property of McKeon Drilling Co., Inc.," and showing "realization from disposition of 3,500,000 shares common stock and 1,000,000 shares of preferred stock of Italo Petroleum Corporation of America (per books and records) issued in acquiring the properties of the McKeon Drilling Co., Inc." [R. pp. 595, 598.] He described this stock as "bonus" stock [R. pp. 595-597, Items 16-55] and stated that Shingle, Brown & Co. "realized" $578,-260.63 [R. p. 598] from the disposition of a portion thereof. He further testified that the "realization" of $578,260.63 was "taken into the profit and loss account of Shingle, Brown & Co." and "it showed all of it as a profit" [R. p. 613] "was net" [R. p. 664] "that there was no consideration paid" for the stock. [R. pp. 625, 630.]

Thereupon appellants sought to cross-examine the witness for the purpose of showing that the figures $578,-260.63 did not represent a net profit, that items of costs, expenses and valuations of services were properly charge-

able against the same, and that consideration was rendered therefor. [R. pp. 664-669.] An objection was interposed on the ground of improper cross-examination, followed by a colloquy between court and counsel whereupon the court ruled that appellants' counsel was not permitted "to question this witness with respect to any matters about any costs, expenses, valuation of services, or any other such thing which may go to constitute a proper charge or expense against this item of $578,-260.63." [R. p. 669.] This ruling of the court is assigned and specified as error. (A. E. No. 49.) [R. pp. 1462-1468.]

X.

The court erred in refusing to permit cross-examination of the witness Goshorn, called on rebuttal, with respect to his testimony that moneys received by Shingle, Brown & Co. was profit.

The witness Goshorn, called as a rebuttal witness, testified that the books and records in evidence showed that Shingle, Brown & Co. derived a profit of $84,128.21 from certain pool operations. [R. pp. 1250-1252.] And that the money received was taken into the profit and loss account as income together with many other items of income. [R. pp. 1252-1254.] When questioned concerning these matters on cross-examination the government objected that it was improper cross-examination, which objection was sustained and exception noted. [R. pp. 1354-6.] The ruling is assigned as error. (A. E. No. 68.) [R. pp. 1501-1503.]

XI.

The court erred in admitting in evidence over appellants' objections and in denying motions to strike testimony of the witness Fyfe to the effect that he told the defendant Perata that the defendant Wilkes had a reputation of being an "unscrupulous promoter"; "that Italo was getting in very bad shape"; "that it was generally rumored that the Italo was buying properties at prices very much more than their value" and "that men of very bad reputation were being brought into the company. The company was getting a very bad name." (Assignments of Error Nos. 25 and 26.) [R. pp. 1407-1410.]

Objections, motions and ruling. [R. pp. 214, 215, 216-217.]

XII.

The District Attorney was guilty of prejudicial misconduct and the court erred in permitting the District Attorney to comment on evidence that had been stricken from the record, said evidence being to the effect that the witness Fyfe told the defendant Perata that the defendant Wilkes' reputation was that of an "unscrupulous promoter." (Assignments of Error Nos. 63 and 64.) [R. pp. 1495-1499.] (Assignment of Misconduct and Ruling of the Court.) [R. pp. 1262-1265.]

XIII.

The court erred in proceeding with the trial after the presentation and filing of the affidavit of personal bias and prejudice directed against the trial judge, the Honorable George Cosgrave; and verified by the defendant Siens and joined in by the defendants Shingle and Brown and others. (Assignments of Error No. 4.) [R. p. 1392.]

XIV.

The court erred in failing and refusing to give instruction No. 42 requested by all defendants (A. E. No. 96) [R. p. 1527], and in giving the instruction which appears in the Record at page 1527. (A. E. No. 95.)

XV.

The court erred in failing and refusing to give Instruction No. 55 requested by all defendants (A. E. No. 93) [R. p. 1525] and in giving the instruction which appears on page 1292 of the Record and described in Assignment of Error No. 94. [R. p. 1526.]

XVI.

The court erred in refusing to instruct the jury as requested by appellants appearing in the Record page 1545. (A. E. Nos. 114 and 115.)

XVII.

The court erred in instructing the jury as appears in the Record pages 1536 and 1537 (A. E. No. 105) and in failing and refusing to give the instructions requested by the appellants and assigned as error Nos. 108, 109, 110, appearing in the Record pages 1538 to 1541.

XVIII.

The court erred in refusing to give to the jury the instructions requested by the defendants and the basis of Assignments of Error Nos. 114 and 115 appearing in the Record pages 1543 to 1545.

XIX.

The court erred in refusing to instruct the jury as requested in Instruction No. 41 (A. E. No. 88) [R. pp. 1519-1520] and in giving the instruction appearing in the Record, pages 1520-1521 (A. E. No. 89), with respect to the effect of evidence of good character and reputation.

XX.

The court erred in refusing to instruct the jury to return a verdict of not guilty as requested by these appellants at the conclusion of the evidence introduced by the plaintiff and renewed at the conclusion of all of the evidence. (Assignments of Error Nos. 17 and 18.) [R. p. 1403.]

XXI.

The court erred in overruling objections to the admission of any evidence heard upon the ground that the scheme and artifice to defraud alleged in the indictment had been fully consummated prior to the mailing of the letter pleaded in the twelfth count of the indictment. (A. E. No. 19.) [R. p. 1403.]

POINTS AND AUTHORITIES AND ARGUMENT UPON SPECIFICATIONS OF ERROR.

Various appellants have presented various specifications of error, some of which are applicable to all appellants, and some only to particular appellants. For the purposes of brevity and convenience we will not repeat the arguments presented by other appellants on specifications of error that are applicable equally to all appellants, but will adopt such arguments of the other appellants and, where necessary, supplement such arguments and authorities in so far as the position of these appellants is different from that of others. We shall also, for the purpose of brevity and convenience, argue several specifications of error together when the same proposition of law is involved.

It must now be apparent to the court that, since Shingle and Brown were not officers, directors or fiduciaries of any of the various oil companies involved in the evidence, their position is necessarily different from that of other appellants. It must be kept in mind that they were an independent financial institution dealing at all times at arm's length with all of the parties involved.

Argument on Specifications of Error Nos. I, II, III and IV.

As pointed out in appellants McKeons' brief, the rule is well settled that prejudicial error is presumed where appellants are deprived of substantial rights. (See authorities cited in McKeons' brief, pages 220-225.)

Specifications of error Nos. I, II, III and IV present substantially the same question, viz.: *Does the twelfth*

count of the indictment allege facts sufficient to constitute a public offense triable within the jurisdiction of the United States District Court for the Southern District of California?

As pointed out above the sufficiency of the twelfth count of the indictment was challenged by demurrer before trial by objections to the admissibility of evidence during the trial, by motion for an instructed verdict of not guilty, and by a motion in arrest of judgment *supra,* p. 73. It is our contention that the twelfth count of the indictment does not allege a public offense of which the trial court had jurisdiction, because it alleges an offense committed in San Francisco within the jurisdiction of the United States District Court for the Northern District of California.

Analysis of Mail Fraud Statute.

The mail fraud statute (*Federal Penal Code,* Sec. 215 [18 U. S. C. A., Sec. 338]) provides in part that

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, *place, or cause to be placed,* any letter . . . in any post office . . . *to be sent or delivered by the post office establishment of the United States, or shall take or receive* any such therefrom whether mailed within or without the United States, *or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter"* shall be guilty of an offense.

There are two elements to an offense under this statute: (1) the devising of a scheme or artifice to defraud and (2) the use of the United States mails in the manner provided by the statute for the purpose of executing said scheme or artifice.

U. S. v. Young, 232 U. S. 155 [58 L. Ed. 548];
Powers v. U. S., 244 F. 641 [C. C. A. 9].

The use of the United States mails is the gist of the offense and is the sole basis of federal jurisdiction.

Brady v. U. S., 24 F. (2) 405;
Havener v. U. S., 49 F. (2) 196.

A fraudulent scheme being assumed, it is a violation of the statute (1) **to place or cause to be placed** in the post office any mail matter to be sent or delivered by the post office; (2) **to take or receive** any such mail matter from a post office; or (3) to **"knowingly cause to be delivered** by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed" any such mail matter.

Under this statute jurisdiction is in one of three places. (1) Under the *mailing provisions* (Subd. 1, *supra*) at the place the mail matter is placed in the post office. (2) Under the second subdivision, at the place the mail matter *is taken or received* from the post office establishment. (3) Under the third subdivision, *at the place of delivery.*

Analyzed, the Twelfth Count Alleges the Mailing of a Letter in San Francisco.

The twelfth count of the indictment incorporates by reference the fraudulent scheme alleged in the first count and then alleges "that defendants did . . . knowingly, wilfully and unlawfully cause to be placed in the United States Post Office in San Francisco, California, and cause to be delivered by the post office establishment of the United States at Los Angeles, California . . . a certain letter in a postpaid envelope addressed to Mr. O. J. Rohde at 727 West Seventh Street, Los Angeles, California," [R. p. 56.] That *this count of the indictment clearly alleges an offense under the mailing provisions of the mail fraud statute* must be apparent from the allegations that the defendants did "knowingly, wilfully and unlawfully cause to be placed in the United States postoffice at San Francisco" a certain letter. The offense, therefore, is alleged to have been committed at San Francisco and not at Los Angeles.

The inclusion of the *explanatory words* "and cause to be delivered by the postoffice establishment of the United States at Los Angeles, California" does not affect the primary allegation of mailing at San Francisco. If we omit the last quoted words it is at once apparent that the count alleges an offense committed by the mailing of the letter at San Francisco. The statute does not make it an offense to "cause to be delivered" by mail a letter. It is made an offense to "*knowingly cause* to be delivered by mail" mail matter (1) according to the direction thereon, or (2) at the place at which it is directed to be delivered by the person to whom it is addressed. To sustain the indictment as alleging that defendants

"knowingly caused to be delivered by mail" the pleaded letter the court must disregard the primary allegation of mailing at San Francisco.

That the primary allegation is that of mailing and that the secondary allegation of delivery is merely explanatory thereof, is settled by decided cases.

In the case of *Salinger v. Loisel*, 265 U. S. 222 [68 L. Ed. 989] the defendant was indicted in the District of South Dakota and arrested upon the indictment in New York and New Orleans. In both latter places he was ordered removed to South Dakota for trial. He contended that the South Dakota court was without jurisdiction for the reason that the indictment charged an offense committed by the mailing of a letter in Iowa and not in South Dakota, and that to remove him to South Dakota for trial violated his constitutional rights under the 6th Amendment to the Constitution. The Supreme Court in holding that the accused must be tried in the district where the offense was committed said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district; we proceed, therefore, to inquire whether it appears, as claimed, that the offense was not committed in the district to which removal is sought."

Analyzing the indictment in the *Salinger* case to determine where the offense was alleged to have been committed, the Supreme Court said:

> "The indictment charges that the defendants, of whom Salinger is one, devised a scheme and artifice to defraud divers persons by means described, and

> thereafter, *for the purpose and with the intent of executing their scheme and artifice, did unlawfully and knowingly 'cause to be delivered by mail,' according to the direction thereon, at Viborg,* within the southern division of the district of South Dakota, *a certain letter* directed to a named person at that place, the letter and the direction being particularly described. *The indictment then adds, in an explanatory way* (see Horner v. United States, 143 U. S. 207, 213, 36 L. Ed. 126, 129, 12 Sup. Ct. Rep. 407), *that, on the day preceding the delivery, the defendants had caused the letter to be placed in the mail at Sioux City, Iowa, for delivery at Viborg according to the direction thereon."*

This language is peculiarly applicable to the present case. Here the indictment instead of alleging that the defendants "knowingly caused to be delivered by mail" matter alleges that the "defendants did knowingly, wilfully and unlawfully cause to be placed in the United States postoffice at San Francisco" the letter. And adds *"in an explanatory way"* that defendants "caused the mail matter to be delivered." *As the subsequent allegation of mailing in the Salinger case was held to be explanatory only, so here the subsequent allegation of delivery is merely explanatory of the allegations of mailing.*

That the indictment must be construed as alleging the mailing of a letter in San Francisco is sustained by the Supreme Court in analogous cases brought under the anti-lottery law (Federal Penal Code, Sec. 213), in the case of *Horner v. U. S.,* 143 U. S., 207 at 213 [36 L. Ed. 126 at 129] affirming 44 F. 677. In that case the

defendant was indicted in Illinois charged with six violations of the mail lottery statute. He was arrested in New York and resisted removal to Illinois on the ground that the indictment did not charge an offense committed in Illinois. *The first four counts* of the indictment in the *Horner* case substantially charged that the defendant *unlawfully and knowingly deposited or caused to be deposited in the postoffice at New York* a certain lottery circular "addressed to Mrs. M. Schuchman, 624 Illinois Street, Belleville, Illinois, in said district, and which was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois Street, Belleville, Illinois in said district according to the direction on said circular when it was so deposited in the postoffice at New York." *The fifth count* charged that defendant in Illinois *"unlawfully and knowingly" did "cause to be delivered by mail* to Mrs. M. Schuchman, 624 Illinois Street, Belleville, State of Illinois" a certain lottery circular "which said circular he, the said Edward H. Horner, *theretofore,* to-wit, on the 29th day of December, 1890, *did knowingly deposit and cause to be deposited in the postoffice at New York in the State of New York* . . .and was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois Street, Belleville, State of Illinois, according to the direction so upon said circular as aforesaid." It will thus be observed that the first four counts of the indictment in the *Horner* case are similar to the twelfth count in the present case, in that they charge *the mailing* of the letter in New York (San Francisco) and the delivery thereof in Illinois (Los Angeles) while the fifth count in the indictment in the *Horner* case is the converse, that is, it charges the delivery of the mail matter in Illi-

nois which had been mailed in New York. The trial court in construing the indictment and lottery law said:

> "Any person who shall *knowingly deposit or cause to be deposited,* or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, *or who shall knowingly cause to be delivered by mail* anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and may be proceeded against by information or indictment, and tried and punished, *either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.*
>
> *"This last provision is not enforceable any further than is compatible with the sixth amendment to the United States Constitution, which secures to the accused the right to trial in that district only wherein the offense was committed. Three somewhat different offenses are created by the section above quoted:* (1) *knowingly depositing,* or causing to be deposited, such forbidden matter in the mails; (2) *sending* such matter or causing it to be sent by mail; (3) *knowingly causing such matter to be delivered by mail.* All the counts, I think, describe the matter mailed sufficiently for the purposes of this application, as prohibited matter within the statute. *The first four counts are based entirely upon the first of the above three offenses, viz., knowingly 'depositing or causing to be deposited' such prohibited matter in the mails at New York. The fifth and last count charges the third offense, viz., that within the said southern district of Illinois, the defendant on the 31st of December, 1890, un-*

lawfully did, knowingly, 'cause to be delivered by mail' to the person therein named at Belleville, Ill., a prohibited circular, describing it, which it is alleged the defendant on December 29, 1890, did, knowingly, deposit and cause to be deposited in the New York postoffice, addressed to her as above stated, and which circular was then and there carried by mail for delivery to her.

"The first and second offenses do not require for their completion that the matter deposited in the mails for transmission should be, in fact, transmitted or delivered. All that is required to constitute those offenses is that the prohibited matter should be 'knowingly deposited,' or 'caused to be deposited' in the mails, or 'knowingly sent or caused to be sent' by the mails, for the purpose of transmission. *And if those offenses are completed at the place where the prohibited matter is deposited or sent for deposit, in the mails, whether the matter be transmitted or not, it may be that, under the constitutional provision invoked, no trial for those particular offenses could be had in any other district.* It is not necessary, however, to consider further those two clauses of the statute, or the first four counts of the indictment; for I have no doubt that the last count charges an offense which is not, and cannot be, completed without the delivery of the matter by mail to the person to whom it is addressed. This offense consists, under the third clause of the act, in 'knowingly causing such prohibited matter to be delivered by mail.' "

It is obvious from a reading of the decision in that case that the trial court held that the first four counts of the indictment pleaded an offense within the jurisdiction of

the New York court, and the fifth count an offense within the jurisdiction of the Illinois court.

On appeal the Supreme Court (143 U. S. 207 [36 L. Ed. 126]), after reviewing the indictment, and allegations at length, said:

> "The district judge of the United States for the Southern District of New York issued a warrant to the marshal for that district, to remove Horner to the Southern District of Illinois, 'to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon.' In issuing that warrant, the district judge delivered an opinion (44 Fed. Rep. 677), *basing his decision upon the ground that the fifth count of the indictment charged an offense which was not, and could not be, completed without the delivery of the matter by mail to the person to whom it was addressed; that such offense consisted, under the third clause of the statute, in knowingly causing the prohibited matter to be delivered by mail;* that, under the fifth count, although the voluntary act began in New York, by deposit in the mail, the offense of causing the delivery by mail could not be consummated except by delivery to the person and at the place intended; that, in whatever way Horner might have caused such delivery to be made, either by deposit in the mail at New York or elsewhere, and wherever his voluntary act might have begun, the offense under the third clause of the statute, charged in the fifth count of the indictment, was not committed until the delivery by mail was made; *that, when such delivery was made, the offense was committed, and was committed at the place where the delivery was made.* . . .

"It is further urged, that Horner is held for trial in the Southern District of Illinois, for acts committed in the Southern District of New York. But we agree with the district judge in his opinion that, *whatever may be said of the first four counts of the indictment, the fifth count is good, for the reason stated by him.* . . .

"It is made a distinct offense in Sec. 3894, as amended, knowingly to cause to be delivered by mail anything forbidden by the statute to be carried by mail; . . . The distinct and separate crime charged in the fifth count of the indictment was committed in the Southern District of Illinois, and is triable there. . . .

"Objection is also made to the language of the warrant of removal, in that it directs the marshal to remove Horner to the Southern District of Illinois, 'to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon.' It is urged that, notwithstanding this language, the warrant puts Horner upon trial in the Southern District of Illinois upon the whole indictment, and that it is void for indefiniteness, and does not inform Horner of the nature and cause of the accusation against him.

"We do not think there is any force in either of these objections. *If Horner should be put upon trial in Illinois upon all the counts of the indictment, he can demur to any of them, and thus have it determined which of the counts he shall meet.* The fifth

count is sufficiently specific, and the determination in the warrant of removal is only that there is at least one count of the indictment upon which Horner may be tried in Illinois. That is quite sufficient."

The present indictment is not sustainable under the delivery provisions of the mail fraud statute. The statute *does not require* that a person shall *"knowingly deposit* or cause to be deposited" but only that he shall "deposit or cause to be deposited." However, *the statute does require* that the person shall *"knowingly cause to be delivered by mail."* The indictment does not allege that the defendants "knowingly" caused the delivery of the twelfth count letter.

The law is well settled that an indictment upon a statute must allege distinctly with precision and certainty all of the elements of the offense created by the statute. An indictment omitting any of the essential elements of a statutory offense fails to state a public offense.

31 *C. J.* 703;

Evans v. U. S., 153 U. S. 583 [38 L. Ed. 830];

U. S. v. Carll, 105 U. S. 611 [26 L. Ed. 1153];

U. S. v. Cruikshank, 92 U. S. 542 at 558 [23 L. Ed. 588 at 593];

Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419;

Keck v. U. S., 172 U. S. 437, 43 L. Ed. 505;

U. S. v. Cook, 84 U. S. 17, 21 L. Ed. 539;

Collins v. U. S., 253 Fed. 609, C. C. A. 9;

Moens v. U. S., 267 Fed. 317;

1 *Bish. New Crim. Proc.,* 2nd Ed., Sec. 98-a;

White v. U. S. (C. C. A. 10), 67 F. (2) 71.

In the *United States v. Carll, supra,* the Supreme Court stated the rule thus:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves *fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished;* and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U. S. v. Cruikshank, 92 U. S. 542 (XXIII, 588); U. S. v. Simmons, 96 U. S. 360 (XXIV, 819); Com. v. Clifford, 8 Cush. 215; Com. v. Bean, 11 Cush. 414; Com. v. Bean, 14 Gray 52; Co. v. Filburn, 119 Mass. 297."

When knowledge is an element of an offense such knowledge must be clearly and distinctly alleged in the indictment in the description of the offense.

2 *Bish. New Crim. Proc.,* 2d Ed., Sec. 532, Subdivision 3;

U. S. v. Carll, supra;

1 *Whart. Crim. Proc.,* Sec. 210, p. 258;
Joyce on Indictments, Secs. 410 and 412.

In 2 *Bish. New Crim. Proc.,* 2nd Ed., Sec. 522, it is said:

> "A statute sometimes makes it punishable to do a thing 'knowingly,' or 'knowing' a particular fact; so that the forbidden act, to be *prima facie* criminal, must be accompanied by the knowledge, and this must be alleged."

That the offense consists of the defendants "knowingly" causing the delivery of the prohibited mail matter is apparent from the language of the Supreme Court in the *Salinger* and *Horner* cases, *supra*. The use of the mails in a particular manner and with particular knowledge is the basis of the federal jurisdiction and must be alleged because it is the gist of the offense. Thus in the *Horner* case the Supreme Court said:

> "It is made a distinct offense . . . *knowingly* to cause to be delivered by mail anything forbidden by the statutes to be carried by mail."

Any argument of appellee that the words "knowingly, wilfully and unlawfully" caused to be placed mail matter in the postoffice at San Francisco applies to the words "caused to be delivered by mail at Los Angeles" is not supported by the cases.

> *Crank v. U. S.*, 61 F. (2d) 620 [C. C. A. 9];
>
> *Commonwealth v. Boynton*, 12 Cush. 499 [66 Mass. 499].

The courts have gone far to sustain an indictment where it was questioned for the first time on appeal or after verdict. In the present case, however, the defect in the indictment was called to the attention of the court at the very threshold of the case by demurrer and the point was never waived. We respectfully submit that the twelfth count of the indictment alleges an offense committed in San Francisco and the demurrer thereto should have been sustained and the motion in arrest of judgment granted.

The Trial Court Construed the Twelfth Count as Alleging an Offense Committed in San Francisco.

That *the trial court construed the twelfth count of the indictment as alleging the offense of mailing a letter in San Francisco* is clear from its instructions to the jury. The trial court instructed the jury that [R. p. 1278] "the twelfth count of the indictment charges that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described, *placed in the United States post office in San Francisco* a postpaid envelope addressed to O. J. Rohde at Los Angeles containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234."

And again the court instructed the jury that it was an offense to "place or cause to be placed any letter . . . in the post office establishment to be sent or delivered by the post office establishment." [R. p. 1280.]

The court having construed the indictment as charging the defendants with mailing a letter at San Francisco, should have granted the motion of appellants for an instructed verdict of not guilty and in arrest of judgment.

If the indictment here charged the defendants with "knowingly" causing the delivery of mail matter at Los Angeles, California, according to the direction thereon, then this element of the offense should have been stated to the jury by the court in its instructions.

It is the duty of the court to instruct the jury as to the elements of the offense, even in the absence of a requested instruction to that effect. The general rule is:

> "The instruction must contain a definition or explanation of the crime charged, in precise and accurate language, setting forth the essential elements thereof. An instruction is erroneous which assumes to state all the elements of the crime, but omits one or more of them, or which refers the jury to the indictment or information to ascertain any of the essential elements."
>
> 16 *C. J.* 968, citing numerous cases;
>
> *Kasle v. U. S.* (233 Fed. 878), C. C. A. 6;
>
> *Peterson v. U. S.* (213 Fed. 920), C. C. A. 9.

As a general rule it is the duty of the trial judge to instruct the jury fully, distinctly, and precisely, upon the law of the case (3 *Whart. Crim. Proc.,* Sec. 1644), although no request for instructions has been made. (16 *C. J.* p. 962, Sec. 2353; 15 *C. J.* pp. 1055-1056, citing numerous cases.) A neglect to give a full statement of the law requires reversal. (*Wharton, supra; Hersch v. U. S.,* 68 F. (2d) 799.)

Here the trial court *having construed the indictment as charging the mailing of a letter in San Francisco properly failed to instruct the jury that the defendants were charged with having knowingly caused the delivery by mail of a letter in Los Angeles but should have instructed a not guilty verdict. We are unable to understand the inconsistent positions adopted by the court in this case. Taking either horn of the dilemma the lower court committed reversible error and for these reasons the cause should be reversed.*

Argument on Specification of Error No. V.

This specification of error set forth *supra,* page 75, deals with the error of the trial court in unqualifiedly admitting evidence against these appellants with respect to transactions or "parts" of the alleged scheme to defraud when the bill of particulars and indictment specifically excluded them from participation in those transactions or "parts."

As pointed out, *supra,* pages 7 to 11, a bill of particulars was ordered requiring the government to specify those defendants who were alleged to have participated in the various "parts" of the alleged scheme. The government was given permission to amend the bill of particulars, which it did, and the court further ordered "that the government will be bound by the bill of particulars as filed, as against all defendants." As pointed out above in the analysis of the indictment and bill of particulars (*supra,* page 9), appellants Shingle and Brown were excluded from participation in certain transactions and by reason of such exclusion it must follow that, it is alleged that they (1) *did not* cause the execution of the Brownmoor-Italo contract at an excessive consideration, did not cause Italo to issue 600,000 units of its stock as a part of the purchase price therefor, (2) *did not* participate in the application for or receiving of permit from the Corporation Commissioner to issue the 600,000 units of Italo stock for the Brownmoor assets, and (3) *were not* officers or directors of Italo-American or Italo-Pete.

By reason of their exclusion from participation in the transaction whereby the Italo Company acquired the

McKeon assets, the indictment as restricted by the bill of particulars charges that appellants Shingle and Brown (1) *did not cause Italo to contract with the McKeon Company* to purchase the McKeon Company's assets at a consideration far in excess of the actual value of said assets (*supra,* pages 10-11); (2) they *did not cause Italo to issue and deliver to the McKeon Company* 4,500,000 shares of its stock as a part of the purchase price (it being alleged that this was done by the eight defendants who were officers and directors of the Italo Company); (3) that Shingle and Brown *did not have a secret arrangement and agreement* whereby any of the defendants should receive back from the McKeon Drilling Company, 2,500,000 or any other number of shares of the Italo stock issued for the McKeon assets without giving any consideration therefor [*supra,* p. 10; R. pp. 34 and 35]; (4) and Shingle and Brown *did not sell or cause to be sold* to some of the persons to be defrauded *"said stock so received by them* under said secret arrangement and agreement as. aforesaid and to convert the proceeds derived from the sale of the same to their own use and benefit"; (5) Shingle and Brown *did not apply to the Corporation Commissioner* for a permit to issue the Italo stock in acquiring the McKeon Company's assets and (6) *did not represent to the Corporation Commissioner* that Italo had agreed to deliver to the McKeon Company 4,500,000 shares of its stock as a part of the purchase price of said properties, then and there knowing and intending that the McKeon Company would only receive 2,000,000 shares of said

stock and that the defendants should receive 2,000,000 share thereof. [*Supra*, p. 10; R. pp. 35 and 36.]

At the outset of the trial these appellants objected to the introduction of evidence against them with respect to these transactions upon the grounds that they were not binding upon them [R. p. 222] and continuously reiterated these objections [R. pp. 225, 226, 228, 232-236, 261-264, 268, 269, 270], and when government counsel stated that he was offering evidence to show that appellants Shingle and Brown had "received some of the secret profits out of the Brownmoor-McKeon deals" these appellants objected, stating "that the bill of particulars furnished by the government in this case does not claim that Shingle, Brown or Jones were parties to any secret arrangement for the distribution of any of the McKeon Drilling Company stock and defendants were entitled to and did rely upon the allegation and that the government was not entitled to attempt to contradict it." [R. p. 298.] And this objection was continuously reiterated. [R. pp. 319-320, 344, 345, 346, 350, 353, 373, 374, 410, 448, 450, 454, 455, 460, 482 and particularly at 592 and 593, 607.]

The court nevertheless refused to sustain the objections and admitted the evidence unqualifiedly against these appellants as to those transactions that the indictment and bill of particulars excluded them from participation in. That these rulings of the court were prejudicial error must be apparent.

Granting of Bill of Particulars Discretionary.

The law is well settled that the court has discretionary power to grant a bill of particulars whenever it is satisfied there is danger that otherwise a party may be deprived of his rights or that justice cannot be done. A determination that the particulars are necessary is final and not subject to review.

Commonwealth v. Snelling, 15 Pick. (Mass.) 321;
Commonwealth v. Giles, 1 Gray (Mass.) 466;
State v. Wadford, 139 S. E. 608 (194 N. C. 336);
People v. Ervin, 174 N. E. 529 (342 Ill. 421).

Effect of Bill of Particulars Is to Restrict Proof.

The effect of a bill of particulars when granted is to restrict the proof to the matters set forth therein because to allow the party furnishing the particulars to go beyond it would be a surprise on the other party. It is reversible error to admit evidence in violation of the bill of particulars.

31 *C. J.,* p. 753, Sec. 310, Note 85;
U. S. v. Adams Express Co., 119 F. 240, 241;
U. S. v. Gouled, 253 F. 239;
State v. Wadford, 139 S. E. 608 [194 N. C. 336];
2 Bish. Crim. Proc., 2nd Ed., Sec. 643;
Commonwealth v. Giles, supra;
Commonwealth v. Snelling, supra;
Rex v. Hodgson, 3 Car. & P. 422;
Rex. v. Bootyman, 5 Car. & P. 300;

Regina v. Esdaile, 1 Foster & F. 213;

Williams v. Commonwealth, 91 Penn. 493;

Thalmheim v. State, 38 Florida 169 [20 So. 938];

People v. Ervin, supra;

People v. McKinney, 10 Mich. 54;

Starkweath v. Kettle, 17 Wend. [N. Y.] 21;

McDonald v. People, 126 Ill. 150 [18 N. E. 817].

In the early case of *Regina v. Esdaile, supra,* a bill of particulars had been granted. Evidence was offered which was not within the transactions specified in the bill of particulars and Lord Campbell sustained the objection to the admission thereof.

In *Commonwealth v. Snelling, supra,* the defendant was indicted for criminal libel. Under the Massachusetts statutes, if the defendant expected to plead the truth of the statements as a defense, he was required to furnish a bill of particulars specifying the statement made and the times and places of the making thereof. The bill of particulars was ordered and furnished; during the trial evidence was offered of transactions not within the bill. The objection thereto having been sustained the defendant was convicted and appealed. The eminent Chief Justice Shaw, in reference to bills of particulars, said:

> "For this purpose, it may be proper to inquire somewhat extensively into the practice of courts of common law in requiring bills of particular, and the principle upon which it is founded."

The learned Chief Justice then reviewed numerous court decisions and said:

> *"The general rule* to be extracted from these analogous cases, *is, that where,* in the course of suit, *from any cause, a party is placed in such a situation, that justice cannot be done in the trial, without the aid of the information to be obtained by means of a specification or bill of particulars, the court in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form; and that such an order may be effectual and accomplish the purpose intended by it, the party required to furnish a bill of particulars, must be confined to the particulars specified. . . .*
>
> *"The defendant having in his bill of particulars specified certain cases, and added the words 'and others' was prohibited from going into evidence of cases not otherwise specified. All the reasons which require a specification, require that the defendant should be confined to the cause specified, otherwise the purpose of the order would be wholly defeated."*

In *Commonwealth v. Giles, supra,* the defendant was indicted upon a charge of being a common seller of intoxicating liquor without a license. Defendant moved for and was granted a bill of particulars which specified the names of the persons to whom the sales of liquor were alleged to have been made. At the trial the District Attorney offered evidence *of other sales by defendant to persons not named* in the bill of particulars. The trial court admitted the evidence over objection to show the place of delivery and that the defendant was engaged in the business of being a common seller of liquor. For the

admission of this evidence the Supreme Court of Massachusetts reversed the case, saying:

> "Under an order of the court he (defendant) had been furnished before the trial, by counsel for the Government, with a list specifying the names of the persons to whom the sales which would be relied upon in support of the indictment, had been made. *Yet, upon the trial, the Government was permitted, against objection, to adduce proof of sales which were neither alleged in the indictment, nor indicated in the specifications.*
>
> "*It is now a general rule, perfectly well established,* that in all legal proceedings, civil and criminal, *bills of particulars or specifications of facts may be ordered by the court whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done.* Whether such an order shall be made is a question within the discretion of the court where the cause in which it is asked for is pending, to be judged of and determined upon the peculiar facts and circumstances attending it. We are inclined to think that such a determination is final in the court where it is made and is not open to re-examination or revision. *But whether this be so or not, when it is once made, it concludes the rights of all parties who are affected by it; and he, who has furnished a bill of particulars under it, must be confined to the particulars he has specified, as closely and as effectually as if they constituted essential allegations in a special declaration.* (Commonwealth v. Snelling, 15 Pick. 321.)
>
> "*The evidence, therefore, of sales not mentioned in the list which was furnished to the defendant in the present case was inadmissible, and should have been rejected.* The particular purpose for which it was

allowed to be adduced, scarcely, if at all, limiting or diminishing its general force and effect, constituted no exception to the general rule, and afforded no sufficient or legal reason for disregarding it. *On the contrary, it seems to be particularly fit and necessary that the rule should have been supported and enforced, because this evidence of which the defendant was impliedly assured that nothing should be offered, tended directly and strongly to his conviction of the offense of which he was accused . . . as this evidence was material and defendant may have been injuriously affected by it a new trial must be granted."*

In the case of *State v. Wadford, supra,* defendant was indicted for embezzlement. The District Attorney furnished a bill of particulars specifying the six persons from whom he expected to prove the money was collected by the defendant and embezzled. On the trial, over objection, the state was permitted to offer evidence of two accounts of other customers not specified in the bill of particulars from whom the defendant was alleged to have collected money and embezzled the same. Defendant appealed from his conviction. The court in holding that the admission of this evidence was prejudicial and reversible error reversed the case, saying:

"Does the filing of a bill of particulars in a prosecution for embezzlement confine the state in its proof to the items set down or enumerated therein? . . .

"*The uniform current of authorities in other jurisdictions, where the question has been considered, is to the effect that* while the action of the trial court in ordering or refusing to order a bill of particulars is a matter of judicial discretion, nevertheless, *when once ordered and furnished, the bill of particulars*

becomes a part of the record and serves (1) to inform the defendant of the specific occurrences intended to be investigated on the trial, and (2) to regulate the course of the evidence by limiting it to the items and transactions stated in the particulars. (McDonald v. People, 126 Ill. 150, 18 N. E. 817; Commonwealth v. Giles, 1 Gray (Mass.) 466; People v. McKinney, 10 Mich. 554; Starkweather v. Kettle, 17 Wend. (N. Y.) 21; Bishops Crim. Proc., 2d Ed., Sec. 643; 14 R. C. L. 190; 31 C. J. 752."

The court, after quoting from the case of *United States v. Adams Express Co., supra,* said:

"The true office of a bill of particulars is two-fold. It is intended 'to inform the defendant of the nature of the evidence, and the particular transaction to be proved under the information and to limit the evidence to the items and transactions stated in the particulars.' (Citing People v. McKinney, *supra.*)

"Its purpose is to give him notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial, so that he may the better or more intelligently prepare his defense and its effect, when furnished, is to limit the transactions set out therein. (People v. Depew, 237 Ill. 574, 86 N. E. 1090.) Unless this be its purpose instead of making for a fair trial it might tend to entrap the defendant and throw him off his guard or what is worse, prove to be a snare and a delusion.

"The competency of the evidence, herein questioned, to establish *scienter* or *quo animo* may not be resolved against the statutory effect to be given

to a bill of particulars which when ordered and furnished has as its purpose the limitation of the evidence to the particular scope of inquiry. Unless it has this effect the bill of particulars is of little value and certainly of doubtful benefit to the defendant. . . . For error in the reception of evidence over objection of transactions not specified in the bill of particulars there must be a new trial."

In the case of *People v. Ervin, supra,* the court said:

"The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions brought in question so that he may be prepared to make his defense. (Cooke v. People, 231 Illinois 9, 82 N. E. 863; McDonald v. People, 126 Illinois 150, 18 N. E. 817, 9 A. S. R. 547.) Its effect, therefore, is treating the bill of particulars as a pleading, to limit the evidence to the transaction set out in the bill of particulars, otherwise the specifications of the bill of particulars would be a delusion or legal snare furnished for the purpose of deceiving the defendant. (People v. Depew, 237 Ill. 547, 86 N. E. 1090.)"

In *United States v. Adams Express Co.,* 119 F. 240, the court said:

"Whether a bill of particulars is a matter of record of part of the indictment, and whether, with the indictment, it is subject to demurrer, are all probably to be answered in the negative. Whether such a bill shall be ordered seems to be discretionary with the court. It can be amended; while an indictment, of course, cannot be amended. An indictment often is in such general terms, and yet sufficient in law, as to

largely fail to apprise the defendant of what he must meet on the trial. *And the office of a bill of particulars is to advise the court, but more particularly the defendant, of what facts, more or less in detail, he will be required to meet. And the court will limit the government in its evidence to those facts set forth in the bill of particulars.*"

In the case of the *United States v. Gouled, et al., supra*, the court after citing the *Adams Express Company* case, *supra*, said:

> "When a bill of particulars is once made and served, '*it concludes the rights of all parties to be affected by it, and he who has furnished the bill of particulars under it must be confined to the particulars he has specified as closely and as effectually as if they constituted essential allegations in a special declaration*' (Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlop v. United States, 165 U. S. 486, 41 L. Ed. 799."

The law is plain, therefore, that it is reversible error to admit evidence of matters contrary to the restrictions of the bill of particulars. The same reasoning applies to the admission of evidence for the purpose of showing that a defendant was a party to a transaction alleged in the indictment when the bill of particulars says that he was not. *The bill of particulars in such case merely serves to deceive the defendant affected if such evidence be admitted.*

What then was the evidence admitted in violation of the bill of particulars and its effect upon these two appellants Shingle and Brown? At the trial the Assistant Attorney General conceded in his closing argument that

the Italo American transaction, the $80,000 loan, the Brownmoor sale, and the Big Syndicate, were proper, not fraudulent, and that a conviction was not justified as to any defendant on the evidence admitted with respect to those matters. He based his plea for conviction solely on the McKeon transaction. This confession of the Assistant Attorney General was obviously in accord with the state of the evidence as will be hereafter seen.

As we have heretofore pointed out appellants Shingle and Brown were entirely excluded from participation in the Italo acquisition of the Brownmoor and McKeon assets. With respect to the McKeon deal they were *specifically excluded from being parties to a secret arrangement and agreement,* if any there was, *to receive any portion of the stock paid by Italo to McKeon for its assets,* or of receiving or selling any of said stock or deriving any benefit from the proceeds of said sale. Participation in the entire McKeon transaction was specifically restricted, in both the indictment and bill of particulars, to the eight defendants named as being officers and directors of the Italo Company. *The indictment and bill of particulars in effect said that "Shingle and Brown had no knowledge of or participation in these transactions."* Despite this, the court nevertheless, over the continuous objections of these appellants, permitted the introduction in evidence of numerous books of account and other documentary evidence which were used as a basis for the testimony of the government account Goshorn and for his summary Exhibit 297 and permitted him to testify that these appellants received a portion of the "bonus" stock issued by the Italo Company for the McKeon assets and "realized" large sums of money from the disposition thereof. These appellants were taken by surprise

by the admission of this evidence in plain violation of the bill of particulars, were deceived by the bill of particulars furnished by government counsel and were deprived, by the conduct of the District Attorney and the court, of that fair and impartial trial to which they were constitutionally entitled. In effect these appellants were tried upon matters not charged against them and which they were unprepared to meet. "No notice was given by the indictment of the purpose of the government to introduce proof of them." (*Boyd v. U. S.*, 142 U. S. 450 (35 L. Ed. 1077 at 1080).)

Argument on Specification of Error No. VI.

This specification of error (*supra*, p. 75) involves the refusal of the court to instruct the jury as to the effect of the bill of particulars on the allegations and proof.

The objections to the admission of evidence violating the solemn inhibitions of the bill of particulars and of the order of Judge McCormick that "the government will be bound by the bill of particulars as furnished, as to all defendants" having proved unavailing, these appellants nevertheless in a sincere and last desperate effort to have the court remedy the prejudice caused by its surprise rulings requested the court to instruct the jury as to the nature and effect of the bill of particulars.

These appellants requested the court to instruct the jury substantially as follows [*supra*, p. 77 *et seq.*]:

1. That the government was bound by, and restricted in its proof to proving the allegations of the indictment *as to the particular defendants named as having participated in the particular transactions,* but that the mere

fact that the bill of particulars specified that a particular defendant participated in a particular transaction was not evidence that he did. [A. E. 70; R. pp. 1404 and 1405.]

2. And that theretofore the jury *was not to consider any evidence as proving or tending to prove that appellants Shingle and Brown participated* in any of the following transactions not charged against them:

(a) In the organization of Italo-American or Italo-Pete [A. E. 71, 72, 73; R. pp. 1505-1507], or

(b) That they received a bonus from *Italo-Pete* for participating in the $80,000 loan [A. E. 74; R. p. 1507], or

(c) That they caused the execution of the Brownmoor-Italo contract or the issuance of stock by Italo for the Brownmoor assets [A. E. 75, 76, 77, 78; R. pp. 1507-1510], or

(d) Caused the execution of the Italo-McKeon contract [A. E. 79; R. p. 1511], or participated

(e) In the proceedings before the Corporation Commissioner for a permit for Italo to issue its stock in acquiring the McKeon assets [A. E. 80; R. pp. 1511 and 1512], or

(f) That they had knowledge of or were parties to a "secret arrangement and agreement" whereby the defendants were to receive 2,500,000 of the 4,500,000 shares of stock issued by Italo to the McKeon Company for its assets [A. E. 36, R. p. 1436; A. E. 81 and 82, R. pp. 1513 and 1514], or

(g) That they received, sold or profited from the sale of the "secret profit stock" "received under said secret arrangement and agreement" [A. E. 83; R. p. 1514].

These requested instructions are set forth in the record at the places above noted, are clearly in conformity to the allegations of the indictment and bill of particulars, are correct statements of the law, and were not covered by any instructions given by the court.

Under the decisions cited in support of the last argued specification of error it was prejudicial error for the court to admit evidence violating the bill of particulars and it was equally prejudicial to refuse to instruct the jury as to the effect of the bill of particulars furnished. In a trial with many defendants it must be obvious that the jury would be unable to sift the evidence as to each particular defendant and to know which acts were charged against some and not charged against others. In all fairness to defendants these instructions should have been given, and even had they been given it is doubtful whether the damaging effect of the admission of the evidence could have been remedied. The probabilities are that such damage could not be remedied, but in any event the refusal to give the requested instructions emphasized the error of the court. Exceptions were taken to the refusal of the court to give these requested instructions. [R. p. 1304.]

We feel that the error of the court with respect to (1) the admission in evidence against these defendants with respect to transactions not charged against them in the indictment and bill of particulars and (2) the refusal of the court to instruct the jury that they were not so charged is such patent error that the appellee herein should confess error. That the evidence was prejudicial cannot be denied. That appellants were taken by surprise cannot be denied because the record affirmatively

shows that with respect to all transactions in which they were advised by the bill of particulars that they were charged with participating they were prepared to and did meet and effectually refute all of said charges, and had they not been misled and deceived by the bill of particulars and indictment they would have been prepared to meet the charges and evidence with respect to these transactions. [R. 591-3.]

We respectfully call the court's attention to the authorities cited under the last specification of error as supporting specification of error No. VI, and also to the cases of *United States v. Pierce,* 245 F. 888 at 890, and the authorities cited in the McKeon brief, pages 352 to 364.

Argument on Specification of Error No. VII.

The court erred in admitting in evidence against these appellants the books of account and records of various corporations of which they were neither officers or directors, of whose contents they had no knowledge and in admitting the testimony and summaries of the government accountants based thereon, for the reason that no proper foundation had been laid for the admission of said records, and they were hearsay as to these appellants.

In McKeon brief, pages 252 to 267, and *supra,* pages 85-87, are listed the corporate books and records of corporations of which appellants Shingle and Brown were admittedly not officers or directors. The records in evidence were those of Italo-American, Italo-Petroleum, Brownmoor, McKeon Drilling Co., John

McKeon, Inc. and International Securities Company. The Wilkes-Cavanaugh records based on the Bacon & Brayton and Lieb Keystone records were not received in evidence although the government accountant's testimony was based in part thereon.

A lengthy standing objection specifying twenty-one separate grounds of objection to the admissibility of the books and records was interposed. [R. pp. 262-264.] A lengthy motion to strike the exhibits from evidence upon substantially the same grounds stated in the lengthy objection thereto was made during the trial [R. pp. 232-236] and a similar motion to strike and limit said testimony was made at the conclusion of the government's case in chief. [R. pp. 686-687.] Exceptions were taken to each adverse ruling of the court. Among the grounds of objection and motion were that the records were incompetent, irrelevant and immaterial; hearsay as to these appellants; there was no showing that the witnesses who identified the records had personal knowledge of the matters therein set forth; that the admission of said records violated the constitutional rights of appellants guaranteed to them under the Sixth Amendment to the Constitution of the United States which provides that each and every defendant has the right to be confronted with the witnesses who have personal knowledge of the matters in evidence; that said records were not the best evidence; that there was no proper foundation laid for their admission in evidence; that the records had not been shown to have been accurately kept; that they were not the books of any defendant on trial, but were the records of corporations, and were not competent or admissible as admissions against the interest of any

of these appellants on trial, and there was no showing that the contents of the books were properly authenticated. [R. pp. 232-236, 262-264.]

The McKeon brief, pages 252 to 330, adequately and clearly summarizes the testimony of the witnesses identifying these exhibits and points out the utter lack of foundation for their admission, and the lack of knowledge the identifying witnesses had as to the transactions recorded in said books or the accuracy thereof. We shall, therefore, adopt this analysis as part of this brief without further repetition.

The McKeon brief does not, however, summarize or discuss the lack of foundation evidence for the admission of the records of the McKeon Drilling Co., Inc.; of John McKeon, Inc., or of the International Securities Company.

As heretofore stated, it was stipulated by government counsel that neither Shingle nor Brown was an officer or director of any of the above-mentioned corporations Upon this subject the appellant Shingle testified:

> *"Neither Horace Brown,* Axton Jones, Rossiter Mikel *or myself* at any time during the period that I have related *was an officer or director or connected in any way in any official capacity or fiduciary relationship with the Italo Petrolcum Corporation, or with any of the other companies that have been mentioned in evidence."* [R. pp. 930-931.]

With respect to the records of Shingle, Brown & Company, a corporation, the court made the following observation:

> "The Court: If you want any further information from Mr. Shingle, you can further cross-examine Mr. Shingle.

Mr. Redwine: *Well, I don't believe Mr. Shingle kept the records.*

The Court: *Well, Mr. Shingle can go and look at his records. They are his own records and he can understand them. Any witness from the witness-stand must be in a position to understand his own records. That would never be indulged for a moment. Go on."* [R. p. 961.]

Appellant Brown testified as follows:

"I was never at any time an officer or director of Italo-American Petroleum Corporation or of Italo Petroleum Corporation of America or of the Brownmoor Oil Company or of the McKeon Drilling Company or of the corporation known as John McKeon, Incorporated, and I never at any time had any access to or any knowledge of the entries contained in the books of account of the McKeon Drilling Company, the Italo Petroleum Corporation of America, the Italo-American Petroleum Corporation or the Brownmoor Oil Company, and I never directed or authorized anyone to make any entries in any of the books of account of these firms.

"With particular respect to the testimony that has been given here as to certain yellow sheets of paper in the handwriting of Mr. Edgar P. Lyons, a former defendant in this action, as to the set-up on the books of the McKeon Drilling Company of the receipt of 2,000,000 shares of the capital stock of the Italo Petroleum Corporation of America by the McKeon Drilling Company, I had no knowledge of and did not direct the entries of any of those matters in the McKeon Drilling Company books." [R. pp. 961-962.]

And that he was never an officer, director, employee or agent of any of these corporations he testified as follows:

> "During all of this period of time concerning which I have testified, I never acted as an agent, employee, director or officer of the McKeon Drilling Company or any of these other corporations that have been here referred to. I was an independent broker dealing for myself."

It must be obvious, therefore, that there can be no possible presumption or inference that appellants Shingle and Brown knew of the contents of the books and records of these corporations, and it was, therefore, incumbent upon the government to affirmatively prove such knowledge. No such proof was offered, but the contrary was clearly established by the testimony above referred to and that of the following witnesses:

The witness COURTNEY MOORE, a director of *Italo-American,* testified that Shingle and Brown had no connection with that company. [R. p. 197.]

The witness EMMA BALDOCCHI, bookkeeper, testified that Shingle and Brown never had access to and did not examine the *Italo-American* books of account. [R. p. 207.]

The testimony of the witness Ida M. Scettrini, a bookkeeper, is silent with reference to Shingle and Brown. [R. pp. 198-203.]

The witness MCLACHLEN who identified the minute books of Italo Petroleum testified that Shingle and

Brown never attended meetings of the Italo directors and were not directors or officers of that company. [R. p. 228.]

The witnesses Ida M. Scettrini, J. H. Jefferson [R. p. 254] and Guy B. Davis [R. p. 260], bookkeepers of Italo-Pete, made no mention of Shingle or Brown.

The witness J. S. Human, an Italo bookkeeper, testified that he never gave Shingle or Brown information from the Italo books. [R. p. 256.]

The witnesses Ralph Sunderhauf and Ada B. Lyle [R. pp. 283, 287, 301], stock transfer agents of Italo, testified that they never received any instructions, written or verbal, from Shingle or Brown.

The *McKeon Drilling Company* records were identified by the following witnesses:

D. C. TAYLOR, a McKeon bookkeeper, testified that Shingle and Brown never gave him any of the information set up in the McKeon books and never even saw the books as far as he knew. [R. p. 319.]

The witness E. A. THACKABERRY, secretary and treasurer of the McKeon Company, testified that the McKeon brothers were the company's officers and directors, *and that he never informed Shingle or Brown concerning the book entries* [R. p. 360] *and that he never saw them examine the books.*

The witness FRANCIS KING [R. pp. 467, 469], identified the books of the *Brownmoor Company* and made no mention of Shingle or Brown.

The books of the International Securities Company identified by the witness H. L. Bentley were received in evidence [R. p. 477], although the witness gave no testimony to the effect that either Shingle or Brown had knowledge of the contents of said books.

The books of John McKeon, Incorporated, a corporation, were received in evidence over objections upon the grounds of their incompetency and hearsay, although no mention was made of Shingle or Brown. [R. pp. 479 and 480.]

Photostatic copies of documents purporting to be records of Lieb, Keystone & Company to Wilkes-Cavanaugh partnership were received in evidence over objections, although the witness Lyle [R. p. 283] testified that Shingle and Brown knew nothing of the contents of said records. [R. p. 287.]

The records of Shingle, Brown & Company, a corporation, were identified by the witness Byers who gave no evidence concerning appellants' knowledge of or familiarity with such records, although appellants were officers of said company.

Exhibits 297, 298 and 299, and the testimony of the witness Goshorn were based on the above records, some of which were and some of which were not in evidence.

LAW AND ARGUMENT.

We have heretofore contended that this case must be reversed for the erroneous admission of the books of account, summaries and evidence in violation of the restrictions of the bill of particulars, and we now contend that the admission in evidence of these records was erroneous as to these appellants because no proper foundation was laid for their admission and they were hearsay.

Under the Sixth Amendment to the Constitution of the United States the appellants were entitled to be confronted by the witnesses against them. The Sixth Amendment provides in part that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Rule Stated as to Foundation Necessary for Admission in Evidence of Corporate Books and Records.

The rule is well settled that a book of account is not admissible in evidence where not shown to be a book of original entries, nor that the entries were made at the date of the transactions recorded, nor that they were known by the persons making them to be correct. (*Kerns v. McKean,* 76 Cal. 87; *Kerns v. Dean,* 77 Cal. 555.) It is necessary to show the correctness of the books and of the entries therein. (*Colburn v. Parrett,* 27 C. A. 541.)

Entries in books of account are admissible in evidence against the party responsible therefor as admissions against interest, and the general rule is that entries of a third person of transactions between such third person and others not parties to the litigation, or one of the

parties litigant, are not admissible because they are hearsay and res inter alios acta.

Sather v. Giaconi, 110 Ore. 433 [220 Pac. 740];

Radtke v. Taylor, 105 Ore. 559 [210 Pac. 863, 27 A. L. R. 1423].

The rules respecting the admission in evidence of corporate books of account, were well stated by this court in the case of *Osborne v. United States,* 17 F. (2d) 246 at 248, as follows:

> *"Ordinarily, before books of account can be received in evidence, a proper foundation must be laid.*
>
> "In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in regular course of the business, that the business is of a character in which it is proper or customary to keep such books, *that the entries were either original entries or the first permanent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the persons making them had personal knowledge of the transactions,* or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of the business. Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657.
>
> "In discussing the same question in Chaffee & Co. v. United States, 18 Wall. 516, 21 L. Ed. 908, the court said:
>
> "'*And* that rule, with some exceptions not including the present case, *requires, for the admissibility of the entries, not merely that they shall be*

contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.'

"Measured by this rule it is quite apparent that a proper foundation was not laid for the admission of all the books and records received in evidence; *and, unless shown to have been accurately kept, the books of a corporation are not ordinarily admissible against its officers and stockholders in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith.* Worden v. United States (C. C. A.), 204 F. 1; Cullen v. United States (C. C. A.), 2 F. (2d) 524."

In the case of *Worden v. United States,* 204 F. 1 [C. C. A. 6], cited with approval by this court in the *Osborne* case, *supra,* the defendant Worden and one Person were convicted of conspiracy to defraud the United States in the purchase of public land. The defendant

Worden was president of the Worden Lumber Company, defendant Person was superintendent, and one Duell looked after the office and kept the books. At the trial the books of the company were offered and received in evidence against the defendant Worden, and in holding such admission to be error the Circuit Court of Appeals said:

> "The books of account played an important part on the trial. Worden's books kept before the company was formed, were, as against him, competent evidence of the making of the alleged advances to entrymen. But the books were not, from the fact alone that they were Worden's, competent evidence against Person. The question of the competency of the company's books affects both plaintiffs in error. The importance of the books, both of Worden and of the company, appears . . . *and if the evidence offered by the books were eliminated, the proof, in our opinion, would have been insufficient to support a conviction of plaintiffs in error, having in mind the necessity of unlawful agreement, prior to application for purchase.* The books of the company (as distinguished from Worden's) are important. . . .
>
> *"Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions,* and without the necessity of strict authentication beyond establishing the identity of books. Foster v. United States (C. C. A. 6), 178 Fed. 165, 175, 101 C. C. A. 485, 495, and authorities cited. *The corporation, however, is not here the opposite party;* there was no affirmative proof that the books were correctly kept; *and while*

the rule is well settled that entries in the books of a corporation showing dealings between it and its managers are competent evidence against the latter, even in a criminal prosecution, on proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, as being admissions or assertions of the facts stated therein (Foster v. United States, *supra;* People v. Leonard, 106 Cal. 302, 39 Pac. 617; Olney v. Chadsey, 7 R. I. 224; Bacon v. United States, 97 F. 35, 40, 38 C. C. A. 37), *yet such is, we think, the only theory on which the entries in question can be held competent evidence against the defendants.* State v. Ames, 119 Iowa 680, 684, 94 N. W. 231; Lang v. State, 97 Ala. 41, 46, 12 South. 183; Bartholomew v. Farwell, 41 Conn. 107, 111.

"While (unless by the above paragraph which we have italicized in full) the court made no express ruling that the proofs were such as to make the book entries competent evidence against the defendants, we are constrained to think that the language referred to (and in view of the fact that defendants were shown to have participated in the management of the company, and that one of them, although not one of the plaintiffs in error, took part in the bookkeeping) may well have been understood by the jury (although perhaps not so intended) as a ruling that the bookkeeping entries would be, in the contingency stated, competent evidence against plaintiffs in error. See F. C. Austin Mfg. Co. v. Johnson (C. C. A. 8th Cir.), 89 Fed. 677, 683, 32 C. C. A. 309.

"The facts referred to did make the bookkeeping entries competent as against Duell; they were not alone sufficient to make them competent as against

plaintiffs in error. The ruling, we think, constituted prejudicial error unless the evidence, taken together, justified a ruling that the bookkeeping entries were competent evidence against plaintiffs in error. This brings us to the question whether the proofs were such as to justify treating the book entries, including not only the original but transfer entries, competent evidence as against defendants here complaining on the basis of admissions or assertions by them.

"It clearly appears that Person had nothing to do with keeping the books. He was simply superintendent, and there is nothing to indicate that he knew anything about bookkeeping or that he paid any attention to it, or that he directed any of the entries in question. . . . The showing was not such as, in our opinion, to justify a ruling that the bookkeeping entries were competent evidence against him. . . .

"Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as a matter of law competent evidence against him. *We have found no persuasive decision sustaining such legal presumption* (in the absence of statutory requirement of correct bookkeeping) *except on proof that the books were kept under the instruction, direction, or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries.*"

As the court said in the *Worden* case, "the corporation is not here the opposite party." Here the above mentioned corporations were not the opposite party. Neither were the defendants Shingle or Brown officers or directors of said companies and had nothing whatsoever to do with the entries contained in the books of account and never directed the making thereof. We have in this case then, a situation where entries were made in books of account by bookkeepers employed by corporations entirely without the knowledge of appellants, which entries, although not proven to be correct and concerning which the parties making the entries had no personal knowledge of the transactions recorded, are admitted in evidence against these appellants in a criminal prosecution. *The books and entries therein might be considered as admissions against the corporations involved if they were parties to the action, but we cannot see how they can be considered against these appellants personally, especially when they are shown to have had nothing to do with their keeping and no knowledge of their contents. If they are to be considered as admissions against these appellants should not there be some proof that these appellants knew what the books contained?* There was not only no affirmative proof of this fact introduced but it was affirmatively established in all instances that these appellants knew nothing whatsoever of the contents of the above mentioned books. Manifestly these entries could not be admissions of these appellants unless they had something to do with them or knew what they were. If they are to be considered as contradictory of statements which the appellants might have made regarding the conditions of these corporations (which we submit is not the case here), then it is obvious that the proper

foundation must be laid for their introduction. But such is not the case for these were introduced as part of the government's case in chief. Surely under these circumstances entries in books not shown to be accurate, not shown to have been made with the knowledge of these appellants and shown to be the books of third party corporations with which these appellants were not connected, could not be received in evidence as against them. There can here exist no presumption of familiarity with the books by reason of the fact that appellants were officers of the corporation, for here they were not officers of the corporation and the affirmative evidence shows that they had nothing whatsoever to do with the books. As said by the Supreme Court of the United States in the case of *Chaffee & Company v. United States,* 18 Wall. 516 (21 L. Ed. 908):

> *"The books of a corporation are not ordinarily admissible against its officers and stockholders, in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith."*

In the case of *People v. Burnham,* 104 N. Y. Sup. 725, defendant was tried for the larceny of funds of a company of which he was an officer, said larceny being the use of the company funds in paying the claim of a third person made against another officer of the company individually. The books of the corporation were introduced in evidence against the defendant to show an entry

respecting the payment of the claim of the third person. With reference to this testimony the court said:

> "There was also evidence admitted, against the objection and exception of the defendant, in relation to the entry in the books of the corporation respecting this payment, *which was incompetent as against this defendant. He was not shown to have had anything to do with these books, or any knowledge of their contents, or any connection with the entries. The books of a corporation are not evidence as against an officer of the corporation in a criminal prosecution against him.* Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816 (P. 734)."

The leading case in California upon this point is the case of *People v. Doble,* 203 Cal. 510. In that case defendants were charged with a conspiracy to violate the Corporate Securities Act. One of the defendants, Cox, kept a combined set of books, some in Los Angeles and others in San Francisco. An accountant on behalf of the prosecution was allowed access to certain books supposed to be Cox's books and from them a summary was compiled and introduced in evidence over the objection of appellants. In this connection the Supreme Court said:

> "It is contended, however, that said books and the summary thereof were admissible as the acts of an agent as to the substantive offenses charged and as the acts of a co-conspirator as to the offense of conspiracy. If we admit that Cox was the agent of appellant, this might allow *his declarations, made within the scope of his agency, to be admitted in a civil cause, but human liberty does not rest upon so weak a foundation. A principal, in order to be held criminally liable, must be shown to have knowingly*

and intentionally aided, advised, or encouraged the criminal act committed by the agent. In the absence of proof to this extent, the summary of the books should not have been received as a declaration binding upon appellant. . . .

* * * * * * * *

"It should also be observed that said summary received in evidence was compiled not only from the Cox books, but also from the books of the Doble corporation and from a comparison of the two sets of books. But again appellant denied all knowledge of the entries in the books of said corporation, in so far as the same were summarized and received in evidence. The summary of the Doble corporation books was apparently admitted upon the theory that the set of books from which the entries were taken consisted of books required by law to be kept and hence admissible for that reason."

The court, after quoting with approval from the *Worden* case, *supra,* said:

"In the case of McDonald v. United States, 241 Fed. 793, 800 [154 C. C. A. 495], one Hendrey, the president of a Memphis bank, with plaintiffs in error and six others, was indicted for using the mails in furtherance of a scheme to defraud by organizing a company, called a bank, but in substance a holding company or chain of banks, and selling stock in and getting deposits therefor by false representations. Upon various errors alleged the verdict and sentence against Hendrey were reversed, the court, among other things, holding as follows: 'Evidence was received as to the contents of the books, of the Memphis bank, of which Hendrey was president. This bank was a corporation, and the

contents of the books of the corporation could not be put in evidence in a criminal prosecution against the president without a more direct showing of his personal responsibility for the bookkeeping than we observe here. (Worden v. United States, 204 Fed. 1, 9 [122 C. C. A. 315].)"

Further citation of authority is unnecessary for the reason that it is apparent that these books and records were not admissible in evidence against these appellants for any purpose whatsoever. From the foregoing cases it is clear that, assuming a proper foundation had been laid as to the accuracy and contemporaneous making of the entries, the books of a corporation are admissible against its officers and directors as admissions against their interests only upon a showing of knowledge of and familiarity with the entries therein. Such knowledge and familiarity must affirmatively appear from the evidence and is never presumed. The converse of this rule is also true and that is that corporate records are not admissible or competent against persons who, the evidence affirmatively shows, were not officers or directors of the corporations involved and did not have access to or knowledge of the entries in the said books of account. The basic reason for the rule is that such entries are hearsay.

Under the rules above quoted it was necessary before such records were admissible against any defendant to show that such defendant had knowledge of the entries contained in said books and here such evidence is lacking. As stated in the *Worden* case, *supra,* "the books were not from the fact alone that they were Worden's competent evidence against Person." It is clear that these appellants had no knowledge of any of the entries contained in

the books of the McKeon Drilling Co. and the other corporations.

The obvious purpose and effect of the admission in evidence of the above mentioned records was so that they might be used as the basis of the summaries of the government accountants to show the following matters:

1. The Italo American books to show the payment of dividends from capital and not from net earnings or surplus, and that the book value of the Italo American assets had been appreciated on the books.

2. The Brownmoor books to show who the stockholders of record of that company were and that the 600,000 units of Italo Petroleum Corporation stock issued for the Brownmoor assets were not distributed to such stockholders of record and the elimination of the Baldwin Hills-Inglewood lease from the assets transferred to the Italo Petroleum Company.

3. The Italo Pete books were admitted to show the nature and book value of the assets acquired from the Italo American and Brownmoor and other companies, the issue and transfer of shares of stock and the financial condition of the company.

4. The McKeon books were admitted to show the cost and book value of the assets transferred to Italo, the consideration contracted for and received by McKeon; that a number of shares of the stock were paid "as commissions," "bonus" or "secret profits," and the explanation of the profit on the McKeon-Italo transaction.

Without this evidence, that remaining in the record merely disclosed the following facts:

1. That Italo Pete borrowed $80,000 from a syndicate which it repaid.

2. That Italo Pete bought certain assets of Brownmoor Oil Company for 600,000 units of Italo Pete stock which were issued to the parties thereto entitled, to-wit: Frederic Vincent & Company.

3. That Italo acquired the assets or stock of many oil companies at a fair valuation and that the sellers of said assets received the agreed fair consideration.

4. That a syndicate was formed to finance the acquisition of these assets and the syndicate members received what they were entitled to receive for the moneys subscribed by them.

5. That the stock delivered to McKeon Drilling Co. for the Italo assets was paid to the persons to whom the owners thereof directed it should be paid for valuable consideration; that all persons receiving any of such stock received it for value.

We contend therefore as stated in the *Worden* case, *supra,* that "if the evidence offered by the books were eliminated, the proof, in our opinion, would have been insufficient to support a conviction of plaintiffs in error, having in mind the necessity of unlawful agreement, prior" thereto.

Since the books of account and records were inadmissible the testimony of the witness Goshorn and the summaries prepared by him, Exhibits 297, 298 and 299, were inadmissible (*People v. Doble, supra*), and the evidence of the witness Hynes relative to the Italo-American books was likewise inadmissible.

We adopt the argument in McKeon brief pages 267-285 and the argument respecting the unwarranted conclusions of witness Goshorn therein referred to pages 286-331 with respect to Exhibits 297 and 299.

Argument on Specification of Error No. XV.

The court erred in refusing to give Instruction No. 55 requested by all defendants [A. E. No. 93, R. 1525] and in giving the instruction which appears on page 1292 of the Record and is described in Assignment of Error No. 94. [R. 1526.]

The futile efforts of appellants to protect themselves against the error arising from the admission in evidence of these books and records is fully discussed in the McKeon brief, pages 283 to 285, which argument we adopt without reiteration.

Argument on Specification of Error No. VIII.

The court erred in permitting the jury to receive evidence out of court by sending to the jury room during the deliberations of the jury certain exhibits containing matter that had been stricken from evidence.

This specification of error (*supra,* pp. 89-90) involves the conduct of the trial judge in sending Exhibits 155, 297 and 299 to the jury room, which exhibits contained prejudicial matter that had been ordered stricken from evidence but had not been deleted from said exhibits at the time they were sent to the jury room. Although appellants objected to the said exhibits being sent to the jury room upon the ground that they contained matter that had been stricken from evidence the court overruled the objections and ordered said exhibits sent to the jury for its consideration during its deliberations. [R. 1335 to 1340.]

In the McKeon brief, pages 331 to 352 and *supra,* pages 89-90, are summarized the proceedings resulting in the court sending the objectionable exhibits to the jury room. The prejudicial character of the Westbrook affidavit (Exhibit 155) and the highly prejudicial description of the stock as "bonus" stock on Exhibits 297 and 299 is clearly pointed out.

It Is Reversible Error for the Jury to Receive Evidence Out of Court.

As a general rule it is reversible error to permit the jury even by mistake to take with them to the jury room papers or articles not properly in evidence and which would tend to influence their verdict. (64 *C. J.* 1029, Sec. 820.)

Where a portion of a book, paper or document is excluded from evidence the jury should not be permitted to take the paper on retirement to the jury room unless something is pasted over the excluded portion or it is withheld from the jury in some other effectual mode, and it is error to send the entire paper to the jury room with no safeguard against their examining the parts of the paper which have not been admitted in evidence except a direction to examine only that part which has been admitted. (64 *C. J.* 1029.)

In the case of *Bates v. Prebel,* 151 U. S. 149 (38 L. Ed. 106) an action was brought to recover of the defendant *stockbrokers* the value of certain securities alleged to have been converted. From a judgment for

plaintiff and order denying a new trial defendants appealed. During the trial certain pages of a memorandum book in plaintiff's handwriting purporting to show the date of delivery and the nature of the securities delivered to the defendants was admitted in evidence. After holding that the memorandum was inadmissible in evidence and referring to the fact that nevertheless the entire book was permitted to be taken to the jury room the Supreme Court said:

> "By the ninth assignment of error it appears that after the close of the case, and when the jury were about to retire to consider their verdict, the court allowed the whole of the memorandum book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence. It appears that when the court admitted the leaves and pages containing the memoranda above alluded to, it directed the rest of the book to be sealed up or otherwise protected from the inspection of the jury; but that when the jury were about to retire, the plaintiff offered to send the whole book, without such protection, and the court directed the jury not to examine any part of the book except what was put in evidence, and permitted the whole book with that instruction to go to the jury. To this the defendants excepted. *We think the court should have adhered to the directions to take such measures as were necessary to prevent the jury from seeing other portions of the book, as they contained matter, which though bearing upon the issue, was wholly inadmissible as testimony, and was calculated to create in the minds of the jury a strong prejudice against the defendants. This error was not cured by the instructions to the jury not to examine any part of the book ex-*

cept what was put in evidence. Such instructions might have healed the error, if the contents of the book had been unimportant. But the objectionable portions in this case were such as were likely to attract the eye of the jury, and accident or curiosity would be likely to lead them, despite the admonition of the court, to read the plaintiff's comments upon the defendants and her private meditations, which had no proper place in their deliberations. The precise question involved here arose in Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327, where an entire book was suffered to be taken to the jury room when but three pages were in evidence, and it was held that the instruction not to look at the unproved part should not be taken as relieving its admission to the jury room from error. See Com. v. Edgerly, 10 Allen, 184; Stoudenmire v. Harper, 81 Ala. 242."

In the case of *Alaska Commercial Company v. Dinkelspiel,* 121 F. 318 (C. C. A. 9) the court permitted an exhibit for identification to go to the jury room and considered as part of the evidence in the case. At the time the jury requested the exhibit be sent to the jury room the court stated that its recollection was that the paper was marked for identification and then received in evidence while counsel for appellant stated that it was identified and was never offered in evidence and counsel for the appellee stated that it was an oversight if it was not offered in evidence. In holding that the action of the court in permitting this exhibit to be taken to the jury room was reversible error this court said:

"The paper never having been offered in evidence, nor submitted to opposing counsel for their exami-

nation, the latter had no opportunity to cross-examine the witness who made it concerning the data from which it was prepared, or other circumstances connected therewith. *In view of all these considerations, it is impossible to escape the conclusion that to permit the exhibit to go to the jury as evidence was error for which the judgment must be reversed. We are unable to say how much the jury may have been influenced by such evidence in finding their verdict. It is enough to say they may have been influenced by it.* Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. ed. 106; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. ed. 299." In the case last cited, Mr. Justice Harlan, speaking for the court, said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party;" citing Smiths v. Shoemaker, 17 Wall. 630, 639, 21 L. ed. 717; Deery v. Cray, 5 Wall. 795; Moores v. Nat. Bank, 104 U. S. 625, 630, 26 L. ed. 870; Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. ed. 62."

A new trial should have been granted for this consideration by the jury of evidence not admitted. New trials are freely granted where the jury are allowed to consider papers and documents not in evidence. (16 *C. J.* p. 1171, Sec. 2679.)

Prejudice Is Presumed and Burden Is on Appellee to Show Lack of Prejudice.

In *Ogden v. U. S.,* 122 F. 523 (C. C. A. 3) defendant was prosecuted for violation of the Food and Drug Act in selling insufficiently stamped oleomargarine. After conviction a new trial was granted and on the retrial he was again convicted. The court refused to allow the defendant to file, and refused to consider, a motion for a new trial. This was held error. In retiring to consider its verdict the jury was handed the indictment with the endorsement thereon of the guilty verdict of the first trial. In this connection the court said:

> "It is, however, contended by the counsel for the defendant in error that it is not shown by the depositions taken that the indorsements on the indictments were read by any of the jurors. *The fact that papers with such indorsements upon them were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the court, could hardly fail to give to the jury the impression that they were intended for their consideration, and that they were expected to have some weight in forming their verdict. We do not think it was necessary on the part of the defendant below to show that such indorsements had been read by the jurors or any of them. It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were. Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interests of an impartial ad-*

ministration of justice. It was not necessary, therefore, in our opinion, that the defendant below should have gone further than he did, when he showed the presence in the jury room of the indictments with the obnoxious indorsements, and the circumstances under which they came into the possession of the jury. Whether proof that these indorsements were not read by any of the jury would have brought us to a different conclusion need not now be considered. *If it would have had such an effect, the burden was upon the defendant in error to produce the proof. The presumption that their presence in the jury room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below.*

We could rest this view of the matter upon the exceeding importance of guarding every approach by which improper influence may reach the jury room, and it would much diminish the efficiency of these safeguards if we were to require the aggrieved party to a suit, to not only show that obnoxious and prohibited documents or other evidence were in the possession of the jury, but that the jurors had actually availed themselves of the opportunity thus presented to them by reading or discussing the same. An auxiliary reason for the view we have thus stated is that it is not open, to one seeking to set aside the verdict of a jury, to use jurors themselves as witnesses to disparage their own verdict."

Where such evidence is sent to the jury room there must be a clear showing that the evidence sent was not prejudicial. (*People v. Thornton,* 74 Cal. 482.)

As pointed out in the above cases the burden is not upon the appellants but is upon the appellee to show that

the evidence sent to the jury room was not prejudicial. It is clear that Exhibit 155 was prejudicial to the defendant Siens. It was likewise prejudicial to the appellants Shingle and Brown and others in view of the statement to the effect that the "Shingle Syndicate" made large profits "of from five or ten to one." Considering the fact that the only count upon which the defendants Shingle and Brown were convicted referred to a letter sent to a syndicate member and were acquitted on all other charges, this statement in the statement must have been prejudicial to their interests.

With respect to Exhibit 297 the gist of the charge of the government with respect to the McKeon Drilling Co. Inc. transaction was that this stock was a "secret profit" and that the defendants (at least some of them) had a "secret arrangement and agreement" whereby they were to obtain this stock as a "secret profit" or "bonus" without giving any consideration and to divide the same among themselves. This being the focal point of the government's case it was highly prejudicial and erroneous for the government accountant to designate this stock as "bonus stock" when there was no such designation of the same in any of the records in evidence. It is the duty of an accountant to examine the books and records in evidence and to give a summary of the contents thereof, but it is not the duty of an accountant to usurp the functions of the jury and designate that stock as "bonus" stock, or declare that said stock was delivered without consideration. It is not the duty of an accountant to go outside of the records in evidence and coin a prejudicial, damaging label for the transactions shown by the books and records.

In the case of *Lewis v. United States,* C. C. A. 9, (38 F. (2) 406 at 411) this court described the duties of an expert accountant as follows:

> "The reason for utilizing an expert accountant is that he may *explain the technical significance of the account books,* that is, of the nature and character of the entries, whether debit and credit, etc. and to deduce therefrom whether the books do or do not show certain facts in issue. In the strict sense of the term he does not testify at all, except as to the accuracy and good faith of his deductions. *He fills the same function as an adding machine, or a mechanical computer.*"

To allow the above mentioned evidence to go to the jury room must have left an indelible impression on the jury that the stock was "bonus stock" and was labeled such in the books and records examined by the government accountant and upon which he based his testimony.

As was said in the *Ogden* case, *supra:*

> "The fact that papers . . . were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the court, could hardly fail to give to the jury the impression that they were expected to have some weight in forming their verdict . . . It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were."

After a jury has retired to deliberate on its verdict unusual care should be and always is exercised to see that the jury does not communicate with persons outside the

jury room and does not receive evidence out of court. In the present case the court did not only not endeavor to keep the rejected evidence from the jury, but *expressly ordered that it be delivered to them* even though counsel expressly called the court's attention to the fact that such exhibits were not in evidence. For the court to sanction the sending of evidence to the jury room which has not been received in evidence but has been expressly excluded therefrom would be to place judicial sanction upon the deprivation of a defendant of his constitutional rights to a fair trial by jury For these reasons we respectfully contend that reversible error was committed and the cause should be reversed.

Argument on Specification of Error No. XI.

It was prejudicial error for the court to admit evidence as part of the government's case in chief to the effect that the appellant Wilkes and his associates were men of "very bad reputation" and that Wilkes was an "unscrupulous promoter."

In this specification of error, *supra,* page 93, we have summarized the evidence, objections, rulings and exceptions with respect to the testimony of the witness Douglas Fyfe called as a witness in the government's case in chief to the effect that he told the defendant Perata "that men of very bad reputation were being brought into the (Italo) company" and that Wilkes was an "unscrupulous promoter". That such evidence was prejudicial and improperly admitted must be apparent.

Evidence of Bad Character Inadmissible Unless Good Character First Put in Issue by Defendant.

It is a fundamental rule of criminal law that the state is not entitled to introduce evidence of the bad character or reputation of an accused unless he has already clearly and expressly put his character in issue by introducing evidence of good character.

16 *C. J.* 581, Sec. 1122;

U. S. v. Jourdine, 26 Fed. Case No. 15,499;

U. S. v. Kenneally, 26 Fed. Case No. 15,522;

U. S. v. Warner, 28 Fed. Case No. 16,642;

State v. Shaw, 75 Wash. 326 (135 Pac. 20);

State v. Craddick, 61 Wash. 425;

Mercer v. U. S., 14 F. (2) 281 at 283;

Thompson v. U. S., 283 Fed. 895;

Jianole v. U. S., 299 Fed. 496.

To permit evidence of bad character or reputation of an accused to go before the jury when a defendant has not put his character in issue is reversible error.

See cases cited, *supra,* and

Pound v. State, 43 Ga. 88.

In the case of *Greer v. U. S.,* 245 U. S. 559 (62 L. Ed. 469) the Supreme Court established the rule in the federal courts that there is no presumption of good character; and in so doing the court reaffirmed the rule that the government can only put in evidence of bad character

to refute evidence of good character produced by a defendant, and in this respect said:

> *"As the government cannot put in evidence except to answer evidence introduced by the defense, the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. . . . The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one."*

It is true that the court stated that such evidence was not evidence of the bad reputation of the defendants but a reading of the testimony of the witness Douglas Fyfe will show that the only purpose for which he was called as a witness was to give testimony with respect to these matters. In a case where defendants are jointly tried and indicted it must be apparent that for a witness to testify that such men were men of "very bad reputation" is equally damaging to all defendants on trial.

It is true that the court granted appellants' motion to strike the testimony that Wilkes was "an unscrupulous promoter" but this did not cure the error. *The court refused to strike the testimony that men of "very bad reputation were being brought into the company."* [R. p. 217.]

In the case of *Lockhart v. U. S.*, 35 F. (2) 905, this court had the following to say with respect to this matter:

> *"The question for decision therefore is this, may a court admit incompetent, prejudicial testimony before a jury and cure the error by withdrawing the testimony from the consideration of the jury at the close of the trial?* That this may be done as a

general rule is well settled; but there is an exception to the general rule as well established as the rule itself.

The exception is thus stated in Waldron v. Waldron, 156 U. S. 361, 383, 15 S. Ct. 383, 389, 39 L. Ed. 453: 'There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court.'

In Maytag v. Cummins (C. C. A.), 260 Fed. 74, 82, the court said: 'But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case, and a new trial should be granted.'

See, also, Rudd v. U. S. (C. C. A.), 173 Fed. 912; Quigley v. U. S. (C. C. A.), 19 Fed. (2) 756.

This case falls within the exception and not within the general rule. As already stated, the testimony wrongly admitted was highly prejudicial in its nature, and its effect could not be entirely eradicated from the minds of the jury by a simple instruction to disregard it.

It certainly cannot be said that such testimony would not unconsciously affect the verdict, however much the jury might be disposed to follow the instructions of the court.

See, also, Gee v. Fonk Poy, 88 Cal. 627."

See, also:

Sapp v. U. S., 35 F. (2d) 580 (C. C. A. 8);

Kuhn v. U. S., 24 F. (2d) 910 (C. C. A. 9);

Latham v. U. S., 226 F. 420;

Newman v. U. S., 289 F. 712.

Not only did the attempted withdrawal of this evidence from the jury not cure the error but the court emphasized the error by permitting the district attorney to read this stricken evidence to the jury, as will appear from the next argued specification of error.

Argument on Specification of Error No. XII.

The district attorney was guilty of prejudicial misconduct in reading to the jury testimony to the effect that appellant Wilkes was "an unscrupulous promoter," said evidence having been stricken from the record.

We have hereinabove pointed out the proceedings had in the opening argument of counsel to the jury where he was permitted to argue that the witness Wilkes had a reputation of being "an unscrupulous promoter" These are based on Assignments of Error Nos. 63 and 64 [R. pp. 1495 to 1499] and the proceedings with respect thereto appear in the record. [R. pp. 1262 to 1265.] Counsel immediately assigned the argument as

misconduct on the grounds that it was evidence that had been ordered stricken from the record, but the court said: "No. It will stand just as it is: That a statement made to those present—as to characterizing or giving his opinion as to the statement as to the reputation of Mr. Wilkes was properly in the record. Go on." [R. p. 1264.] Again the matter was called to the attention of the court and the court refused to rebuke the district attorney [R. pp. 1264 to 1265.], but rebuked defense counsel for assigning the argument as misconduct for the court said [R. p. 1266]:

> "Clearly, Mr. Wood, and I am sure that this is the rule, that counsel in arguing to the jury may indulge his own conclusions from what is shown in the evidence. I certainly would be sorry to think that there was any other rule in times past. *Now, don't interrupt. Please don't do that. Those interruptions are unseemly entirely.*"

Surely one can but conclude that the conduct of the district attorney, and that of the court, in permitting such argument was not an inadvertence but an intentional abuse of the rights of argument. The evidence as to Wilkes being an "unscrupulous promoter" and as to men of "very bad reputation being brought into the company" plainly had no place in the record. The matter was called directly to the court's attention with the request that the district attorney be rebuked for misconduct in arguing matters stricken from evidence. Under the authorities above quoted the prejudice was not only not removed but was emphasized by the remarks of the court.

In the case of *Volkmor v. U. S.*, 13 F. (2) 594 [C. C. A. 6] the court said:

> "Even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and instruct the jury to disregard the remarks. This is not a case of inadvertence of statement, but of intentional abuse."

The court, referring to the case of *N. Y. Central v. Johnson*, 279 U. S., 310, 318 (73 L. Ed. 707), in *Read v. U. S.*, 42 Fed. (2) 636 at 645, said:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one. No exceptions were taken to the remarks of the prosecuting attorney, but, as held in the New York Central R. R. case, *supra*, where paramount considerations are involved, 'the failure of counsel to particularize an exception will not preclude this court from correcting the error.' This court in Van Gorder v. United States, 21 Fed. (2) 939, 942, said on this subject: 'In criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error.'"

In the case of *McKnight v. United States*, 97 F. 208 (C. C. A. 6) in an opinion rendered by Justices Taft, Lurton and Day, the district attorney made comments as to the lack of character of the defendant of a less aggra-

vated character than those in the present case. In that case the district attorney said:

> "That he (defendant) stands without a reputation in the community and that he stands without such good character."

The court reversed the case for this prejudicial argument saying:

> "It is the defendant's privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses, confidence in his case, and other considerations, would often dissuade him therefrom, however certain of success therein. Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.'
>
> To the same effect: State v. Upham, 38 Me. 261; Fletcher v. State, 49 Ind. 124; Stephens v. State, 20 Tex. App. 255; State v. Dockstader, 42 Iowa, 436; Ackley v. People, 9 Barb. 610; People v. White, 24 Wend. 520; People v. Evans, 72 Mich. 367, 40 N. W. 473; Pollard v. State (Tex. Cr. App.), 26 S. W. 70."

See, also:

Lowdon v. United States, 149 Fed. 673 at 677;

People v. Gleason, 122 Cal. 370.

Argument on Specifications of Error Nos. IX and X.

These specifications of error, *supra*, pages 91 and 92, deal with the court refusing to permit cross-examination of the witness Goshorn with respect to his testimony to the effect that these appellants had "realized" stock and money from "bonus" stock without giving any consideration therefor and as net profits.

Cross-examination Is Matter of Right.

It is error for the trial court to refuse to permit the cross-examination of a witness to extend to all matters germane to the direct examination as such cross-examination is a matter of absolute right and not a privilege.

Harold v. Oklahoma, 169 F. 47;

Houghton v. Jones, 1 Wall. 702 (17 L. Ed. 503).

Generally speaking when direct examination opens a general subject the cross-examination may go into any phase and cannot be restricted to mere parts which constitute a unity.

People v. Dole, 122 Cal. 483.

The refusal to allow cross-examination of a witness upon matters brought out in direct examination and relevant to the issue is a denial of an absolute right and has been generally held to be a sufficient ground for reversal or granting a new trial.

Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378;

Martin v. Elden, 32 Ohio State 282;

Eames v. Kaiser, 142 U. S. 488 (35 L. Ed. 1091);

Prout v. Bernard Land, etc. Co. (N. J.), 73 Atl. 486;

Babirecki v. Virgil (N. J.), 127 Atl. 594 (39 A. L. R. 171).

In the case of *In re Mary Campbell,* 100 Vt. 395 (138 Atl. 725, 54 A. L. R. 1369), the court thus stated the rule:

> That which tends to *limit, explain or refute* statements of a witness on direct examination *or to modify the inferences deducible therefrom* comes within the range of proper cross-examination when the credibility of the witness is not involved. Thus far counsel may go as a matter of right.

In the case of *Alford v. U. S.*, 282 U. S. 687 (75 L. Ed. 624), it was held reversible error for the trial court to sustain an objection to a question asked of a prosecution witness "where do you live?" The court summarized the authorities holding that cross-examination of a witness is a matter of right; that it should be permitted to show the untruthfulness or biased character of the testimony of a witness and that cross-examination must necessarily be exploratory. In this connection the Supreme Court said:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.* . . . (Citing cases.) *To say that prejudice can be estab-*

lished only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citing cases.) In this respect a summary denial of the right to cross-examination is distinguishable from the erroneous admission of harmless testimony. (Citing cases.)"

That the questions propounded to the witness Goshorn were clearly proper cross-examination must be apparent. The subject matter of his direct examination had to do with his conclusions based upon an examination of the books and records in evidence. He had testified that stock and money had been delivered to appellants without consideration and that the amount so "realized" was as a "bonus" and was all net profit. It was obviously within the scope of the cross-examination to question the witness with respect to the disposition of these moneys. It was proper to question him concerning the value of any services that had been rendered as consideration for the money and stock so received. It was proper to question him for the purpose of ascertaining whether this money which went into the profit and loss account had been subsequently returned to the McKeon Drilling Company or what had been done with it. It was proper cross-examination to examine this witness with respect to all of the items in the books of account upon which he had based his testimony. The undue restriction of this right of cross-examination constituted prejudicial error. The court ruled that counsel could not question the witness "with respect to any matters about any *costs, expenses, valuations of services or any other such thing which may*

go to constitute a proper charge or expense against this item of $578,260.63."

The bias and prejudice of the trial court in favor of the government accountant was clearly demonstrated but the law is well settled "that whatever may be the opinion of a judge as to the credibility of a witness he should permit full cross-examination of the witness without unnecessary interference."

York v. U. S., 299 F. 778.

Argument on Specification of Error No. XIII.

The court erred in proceeding with the trial after the presentation and filing of the affidavit of personal bias and prejudice as directed against the trial judge, the Honorable George Cosgrave, and verified by the defendant Siens, and joined in by appellants Shingle and Brown and others.

The analysis and argument contained in the McKeon brief, (pages 225 to 251), with respect to these proceedings is so clear, complete and logical that we deem it unnecessary to add thereto. We feel that the affidavit was plainly sufficient as a matter of law and that the facts therein stated, believed by appellants to be true, were sufficient to show a personal bias and prejudice on the part of the trial judge against appellants and in favor of the government. We therefore adopt the argument and analysis contained in the McKeon brief as part of this brief.

Arguments on Specifications of Error Nos. XIV, XV, XVI, XVII, XVIII and XIX.

The court erred in instructing the jury on matters of law and in refusing to instruct the jury as requested by appellant.

These specifications are all directed to the instructions given by the court or to those requested and refused; specification of error No. XIV covered by assignments of error Nos. 95 and 96 [R. p. 1527] covers the instruction given by the court with respect to the credibility of witnesses. As pointed out in the McKeon brief (pp. 380 to 384) the court instructed the jury in substance that the presumption is that a witness (and a defendant as a witness) is presumed to speak the truth, but that this presumption "may be *repelled* (1) *by his reputation for truth and integrity,* (2) by the *probability* of his testimony and (3) to the extent to which it is *corroborated* by known facts in the case" [R. p. 1527].

This instruction in effect advised the jury that if a defendant had produced evidence of his *good reputation* for truth and veracity (which Shingle and Brown did) such evidence would serve to *repell* the presumption that such defendant testified truthfully. The instruction in effect further advised the jury that the *"probability", not the improbability,* of a defendant's testimony served to rebut the presumption that he was telling the truth, and further that, if a defendant's testimony were corroborated by the known facts in the case *that corroboration* also would serve to rebut the presumption that the defendant and his witnesses were testifying to the truth.

At the oral argument the court questioned whether sufficient exception was taken to the erroneous instruction *given by the court* on the credibility of witnesses. We think that the exception was sufficient in view of the following:

1. Exception was taken to the refusal of the court to give the *requested correct instruction* No. 42 [R. p. 1319] in the following language [R. p. 1304]:

> "We except to the refusal of the court to give the following numbered instructions requested by the defendants for the reason that the matters therein suggested *are a proper statement of the law* and have not been by the court fully covered or presented to the jury in its given instructions and such instructions relate directly to the questions to be determined by the jury and are necessary to properly aid them in their determination of the questions submitted for their consideration."

After this exception was taken the court refused to correctly instruct the jury. The only other exceptions to the *instruction given* on this subject appear as follows [R. p. 1325]: "to each and every part of the charge", [R. p. 1327] to the good character portion of the given instruction and record page 1333 with respect to that portion of the instruction given upon the question of the falsity of the testimony of a witness "upon the grounds and for the reason that that is not a correct or unqualified statement of the law and omits all reference to the elements of wilfulness and lack of corroboration". The assignments of error appear in the record, p. 1527, A. E. Nos. 95 and 96. We think the matter was therefore, sufficiently called to the court's attention.

> *"An offer of a correct instruction on a particular issue should be considered as a specific objection to instructions given in conflict therewith."*
>
> 64 *C. J.* 951, Sec. 739, citing *Anglin v. Marr Canning Co.*, 237 S. W. 440.

In the case of *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60, certain requested instructions were refused and it was *"ordered that exceptions be and they hereby are noted herein to each and every of the instructions given by the court, and to the refusal of the court to give each and every of the instructions requested by the defendants, which the court refused to give."* In this connection *this court* speaking through Judge Ross held the exception sufficient, saying:

> *"The contention that the exception to the instruction was not sufficiently specific we think without merit.* . . . We are aware of the well-established rule that a general exception to a charge which does not direct the attention of the court to the particular portion or portions of it to which objection is made raises no question for review by the appellate court; the reason being that the attention of the trial court should be drawn to the portion or portions complained of, to enable the court to correct any error that it should find had been made."

And at pages 66 and 67 *this court* said:

> "It is thus seen that the defendants requested the court to instruct the jury . . . *The court,* according to the record that has been set out, *refused to so instruct the jury,* itself directed the entry of an exception on behalf of the defendants to the ruling, *and, to the contrary, in respect to the acts of the inspectors, distinctly instructed the jury* in effect that, if the government officers did instigate or induce the defendants to commit the offense alleged against them, it constituted no bar to the prosecution by the government, *to the giving of which latter instruction the court itself, according to the record, also directed the defendant's exception thereto to be entered."*
>
> *"We think that the attention of the court was by the proceedings above referred to, of necessity, called to the (in)correctness of the instruction given, and at the proper time excepted to, and that is here assigned as error."*

In *Anglin v. Marr Canning Co.* (Ark.), 237 S. W. 440 at 444, the Supreme Court of Arkansas said:

> "While the appellant failed to object specifically to some of these (incorrect) instructions, *prayer for instruction No. 2 offered by him was a correct instruction and in itself should be taken and considered as a specific objection to instructions which were given by the court in conflict therewith.* . . . the court . . . should have given appellant's prayer for instruction No. 2, because that instruction correctly declared the law. . . . If the court saw fit to give other instructions, on that issue, it should have made these instructions conform with the law as announced in instruction No. 2."

2. Since this court conceded at the oral arguments that the instruction given was plainly erroneous, this court should notice and correct the plain error in order that justice might be done.

In *Crawford v. U. S.*, 212 U. S. 183 (53 L. ed. 465, at 470), the Supreme Court said:

> *"In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.* Wiborg v. United States, 163 U. S. 632, 659, 41 L. ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197."

In the case of *Hicks v. United States,* 150 U. S. 442 (32 L. ed. 1137), the Supreme Court reversed the cause for the giving *of an erroneous instruction on the credibility of witnesses, although proper exception was not taken thereto.*

In the case of *Brashfield v. U. S.,* 272 U. S. 448, (71 L. ed. 345), the Supreme Court reversed the cause because the jury was polled, saying "the failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error."

In the case of *Read v. U. S.*, 42 Fed. (2) 636, at 645, the Court of Appeals for the Eighth Circuit, referring to the case of *N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 301, at 318, said:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one. No exceptions were taken to the remarks of the prosecuting attorney, but, as held in the New York Central R. R. case, *supra*, where paramount considerations are involved, 'the failure of counsel to particularize an exception will not preclude this court from correcting the error.' This court in Van Gorder v. United States, 21 F. (2) 939, 942, said on this subject: *'In criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error.'*"

In the case of *Hersh v. U. S.*, 68 Fed. (2) 799, at 807, this rule was affirmed by this court speaking through Judge Wilbur, as follows:

> *"While this statement was not objected to at the time and no exception reserved thereto, because of it defendant Hersh was entitled to have the jury instructed, as requested, that the failure of the witness to take the stand should not count against him. This error was prejudicial as to Hersh. It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, and the jury is not properly advised thereon by the general charge of the court, the refusal to give such instruction is error."*

Since the instruction was plainly erroneous we think the question was sufficiently reserved for consideration by this court.

We do not recall ever having seen a more misleading or prejudicial instruction than this given by the court.

Appellants, on the other hand, requested the court to instruct the jury in request No. 42 [R. p. 1319] and excepted to the refusal to give this instruction [R. p. 1304]. This requested instruction is that which is embodied substantially in the California Code of Civil Procedure, Sec. 1847, which provides that a witness is presumed to speak the truth, but that this presumption may be repelled (1) "by the manner in which he testifies (2) by the character of his testimony, or (3) by evidence *affecting* his character for truth, honesty or integrity, or (4) his motives, or (5) by contradictory evidence." This requested instruction was obviously a correct statement of the law, while that given by the court was exactly an incorrect statement of the law.

When proper request is made it is the duty of the court to clearly and fully advise the jury of the rules for determining or testing the credibility of witnesses and the weight to be attached to their testimony, and such instructions should not be misleading or confusing (16 *C. J.* 1013-1014, Sec. 2439-2440; *Hersh v. U. S.* (C. C. A. 9), 68 F. (2) 799).

Under this rule and the authorities cited in the McKeon brief (pp. 385 to 387) the court erred in the above instructions given and in refusing the instructions requested.

The error of the court in refusing to give the instructions requested and in giving those covered by specifications of error No. XV [A. E. 93, R. 1525; A. E. 94, R. 1526]; XVI [A. E. 114 and 115, R. 1545]; XVII [A. E. 105, 109, 110, R. 1536 to 1537, 1538 to 1540]; XVIII [A. E. 114, 115, R. 1543 to 1545], will now be considered.

Argument on Specification of Error No. XV.

The refusal of the court to properly instruct the jury as requested with respect to the consideration of the corporate books of account and records and the error of the court in the instruction given by it are fully argued in the McKeon brief (pages 283 to 285) under specification of error No. 5, and the authorities therein cited (pages 277 to 282) are hereby adopted without further argument [A. E. 93 and 94; R. pp. 1525-6.]

Argument on Specification of Error No. XVI.

In the case of *Hersh v. U. S., supra,* this court at page 807, enunciated the following rule with respect to instructions:

> "It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, and the jury is not properly advised thereon by the general charge of the court, the refusal to give such instruction is error. Hendrey v. U. S. (C. C. A.), 233 F. 5, 18; Calderon v. U. S. (C. C. A.), 279 F. 556. In the case at bar we hold that the broad general statements of the court in its instructions concerning concealment were entirely inadequate to properly advise the jury of the rights, duties and obligations of the defendant and upon what constituted the crime of concealment under the peculiar circumstances of this case."

We shall test the requested instructions with this rule in mind to ascertain whether or not the court fully and properly instructed the jury upon the issues presented.

The Court Erred in Failing and Refusing to Properly Instruct the Jury With Respect to the Relations Between Directors and Their Corporation.

The request contained in Assignment of Error No. 114 [R. p. 1543], refused by the court and exception noted [R. p. 1304] is in part as follows:

> "You are instructed that a director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, subject only to the obligation of acting in good faith. It is not a fraud upon the corporation or its stockholders for a director to fail to disclose to the corporation or to the other directors, that he is the real lender, where the loan is nominally made by another person or by a syndicate of which the director was a member. In the absence of proof of bad faith it was not a fraud upon the Italo Petroleum Corporation of America for any director of the Italo Petroleum Corporation of America to be a member of the syndicate which loaned $80,000 to the Italo Petroleum Corporation of America; nor was it wrongful for him to fail to disclose this fact to the corporation or its stockholders."

The propositions of law contained in this requested instruction are fully supported by the following cases:

Castle v. Acme Ice Cream Co., 101 Cal. App. 94 at 101;

O'Dea v. Hollywood Cemetery Assn., 154 Cal. 67;

Schnittger v. Old Home Etc. Mining Co., 144 Cal. 603 at 606.

Under the issues raised by the pleadings the propriety of officers and directors being members of a syndicate which loaned money to the corporation was a fact in issue to be determined by the jury. The court did not in substance or effect give any instruction upon this proposition. [See R. pp. 1295 to 1297.] In view of the fact that the indictment alleged that it was "wrongful" for defendants to lend $80,000 to the corporation and that defendants "wrongfully" received a bonus therefrom this requested instruction should have been given. Although the evidence disclosed that the $80,000 loan cost Italo $80,000 plus lawful interest and that neither Italo nor its stockholders were defrauded by reason of this loan, the propriety of defendants being members of the syndicate was directly tendered by the indictment, was met by evidence presented by the defendants, and the jury should there have been instructed as to the law applicable thereto.

The Court Erred in Refusing to Instruct the Jury That the Par Value of Stock Was Not Presumed to Be Its Actual Value.

This requested and refused instruction [A. E. 115; R. p. 1545] advised the jury that there was no presumption that corporate stock was worth its par or face value, nor that such value was the real value, and the fact that the price paid by the Big Syndicate for 6,000,000 shares of Italo stock was not the same as the par value or may have been less than the par value did not make the transaction illegal or fraudulent. These propositions at law are settled by the case of *Castle v. Acme Ice Cream Co., supra,* and the rule as announced in 14 *Corpus Juris,* page 718, Section 1099.

Inasmuch as the indictment alleged that it was part of a fraudulent scheme for the Big Syndicate to purchase 6,000,000 shares (3,000,000 units) of Italo $1.00 par value stock for $3,500,000, this requested instruction was directly in point and should have been given. The jury not having been so instructed undoubtedly thought that the difference between the par value and the sale price of the stock constituted fraud. Inasmuch as appellant Shingle was Syndicate Manager and these appellants were convicted on a count relating to the Syndicate affairs the failure of the court to give this requested instruction was particularly damaging.

The Court Erred in Instructing the Jury With Respect to a Matter of Which the Court Had Personal Knowledge on a Matter Not Within the Issues of the Case.

In giving this requested instruction [A. E. 105 R. 1536-1537], the court drew upon some incident of which it had personal knowledge which was in no way analogous to the facts in the present case. The judge told the jury that a prominent business man whom the judge knew, had been president of a life insurance company and had received a percentage of the profits of a brokerage firm which acted as fiscal agent in the sale of the life insurance company's stock, and that he, the president of the company, was required to repay this money to the company. Undoubtedly the court was referring to his personal knowledge of the parties involved in the case of

Western States Life Insurance Co. v. Lockwood, 166 Cal. 185.

In the present case Shingle, Brown & Company was a brokerage firm. It had no contract for the sale of Italo stock. It did not have any contract to pay and did not pay any Italo officers or directors any percentage of any profits derived by it from the sale of Italo stock. Hence the illustration used by the court had no application to the facts in the case. The fact that the court here referred *to the president* of the company and *to a brokerage firm* undoubtedly led the jury to believe that Shingle, Brown & Company was being referred to and that Shingle, Brown & Company owed a fiduciary duty to the company and was required to account for profits made by it. Such was not the case and the instruction given was in our opinion clearly misleading and inapplicable.

Defendants on the other hand requested the court to instruct the jury with respect to transactions between corporations and directors in which the property of directors was involved. These requests [A. E. 108, 109 and 110; R. p. 1539], embody the principle announced in California Civil Code, Section 311. The court refused to give this instruction and gave the instruction just referred to in whch it assumed that any profit made by a director from a sale of his property to the corporation was a "secret profit" even though the transaction was as to the corporation just and equitable. (See authorities McKeon Brief, Points XVII to XIX.)

The Court Erred in Refusing to Instruct the Jury With Respect to the Values of the Properties Acquired by Italo.

It will be remembered that the indictment alleged that Italo acquired the Brownmoor and McKeon companies' assets at considerations "far in excess of their actual value." These were material allegations which the government was required to prove to sustain its case. No evidence whatsoever was produced by the government to show what the actual value of such assets was. Italo paid Brownmoor 600,000 units of its stock having a par value of $1.00 per share and assumed $100,000 of Brownmoor indebtedness. As pointed out *supra* (pp. 15-16), at the time of this transaction Italo's stock was selling for $1.27 per unit. It was shown by the evidence that Dr. E. A. Starke appraised the Brownmoor assets at $4,225,835.00 value, and that D. R. Thompson appraised these assets at $2,984,000 value. If it be assumed that the Italo stock was worth its face value, it is clear upon the basis of these appraisals that the assets acquired were worth more than the stock paid therefor.

As pointed out in the McKeon brief the same situation exists with respect to the McKeon assets acquired by Italo. Such assets were of a value far in excess of the stock and cash consideration which Italo agreed to pay therefor. With respect to these transactions the defendant therefore requested the court to instruct the jury with respect to the value of the properties and the value of the capital stock. [A. E. 108, 109 and 110.] These requests were refused and exception noted. [R. p. 1304.] The court gave no similar instruction.

Since the question of value was directly alleged by the government in the indictment the court should have instructed the jury on the law with respect thereto.

It should be clear that the properties acquired by Italo were fairly worth more than Italo paid therefor. There was no secrecy whatsoever as to the fact that R. S. McKeon, a director of Italo, was interested in the McKeon company because he explained this interest to the Italo directors.

In our opinion the failure and refusal of the court to clearly and fully instruct the jury on the law governing the propositions herein referred to was prejudicial and requires reversal.

(See cases cited in McKeon brief, pages 385 and 386.)

Argument on Specifications of Error Nos. XX and XXI.

The evidence was insufficient to justify the verdict of conviction upon the twelfth count of the indictment and the court erred in failing and refusing to instruct the jury to return a verdict of not guilty, in denying appellants' motion for a new trial and in arrest of judgment made upon this ground.

These two specifications of error may be argued together.

The evidence in this case shows that Shingle, but not Brown, was a member of the syndicate which loaned Italo $80,000.00 and that this loan was repaid by Italo with lawful interest. Vincent & Company paid the syndicate, as hereinabove pointed out, 80,000 shares of Brownmoor stock as part of the consideration for the loan. The

mere statement of this proposition shows that the transaction was not a fraud on Italo and that the members of the syndicate, particularly those who were not officers or directors of the Italo company, were not guilty of any fraud by reason of being syndicate members.

As hereinabove pointed out neither Shingle nor Brown had anything to do with the Brownmoor-Italo purchase. Vincent, who held options to purchase 950,000 of the 1,000,000 issued Brownmoor shares, paid to Shingle, Brown & Company $83,000 out of the gross profit of $904,500 made by him on his Brownmoor stock options. This was obviously not a fraud on Italo or its stockholders.

If any one was chargeable with fraud in this transaction it was Frederic Vincent and George Stratton who, while fiscal agents of the Italo company, acquired options on the Brownmoor stock knowing that Italo proposed to acquire the Brownmoor properties and then sold the stock at a profit to themselves. Neither Shingle nor Brown had any knowledge whatsoever of the Vincent transaction. The evidence shows that Italo purchased the Brownmoor assets appraised at $4,225,835.00 by Dr. Starke and $2,984,400.00 by D. R. Thompson in return for the issuance of 600,000 units of Italo stock of a market value of $765,000, *supra,* p. 16. Shingle and Brown were entire strangers to the transaction. The stock issued by Italo to Brownmoor for these assets was distributed to the nominees of Frederic Vincent & Company who owned or controlled 950,000 of the 1,000,000 outstanding shares. There is no contention that the Brownmoor stockholders were damaged in this transaction.

As above pointed out Shingle and Brown were not charged in the indictment or bill of particulars with participating in the McKeon-Italo transaction, or in the alleged secret arrangement and agreement with respect thereto, or in profiting therefrom. Hence this "part" of the alleged scheme should be eliminated as to them. But had they been charged therewith in the indictment, their conduct as shown by the evidence, was above reproach. They merely held the stock issued by the Italo Company and delivered by it to the McKeon Company as an escrow holder and distributed that stock in accordance with the instructions given by the McKeon Drilling Company, the owner of that stock. Neither they nor any bank or trust company holding such stock as escrow holder could have done otherwise. On this subject the government witness Goshorn testified [R p. 662], "From my examination of the escrow records I know that that stock was held by Shingle, Brown & Company *solely as an escrow holder to be distributed by it pursuant to any instructions received by it from the McKeon Drilling Company. I found from my examination of the books and records in evidence that the stock was distributed pursuant to written orders given either by the McKeon Drilling Company or one of the three McKeon brothers,* and that in each instance when any stock was distributed out of that escrow it was done pursuant to written order and a receipt was taken therefor".

We may entirely disregard the alleged payment of illegal dividends by Italo-American in so far as Shingle and Brown are concerned because these transactions took place in 1926 more than two years before either Shingle or Brown ever heard of said company.

No Fraud in Big Syndicate.

The only remaining part of the alleged scheme to defraud is the "Big Syndicate." The indictment alleges that the fraud in the Big Syndicate consisted in the syndicate buying 3,000,000 units of Italo stock from the Italo Company for $3,500,000 or at an average price of $1.16⅔ per unit net to the Italo company. This price was in line with the price at which even small lots of stock were being sold by Italo to Frederic Vincent & Company at that time, which was $1.27½ per unit. [R. p. 904.] The syndicate agreement was submitted to and approved by the Corporation Commissioner. [R. pp. 303 and 975.] It is, of course, common practice in all businesses to sell commodities in large quantities at cheaper prices than sales in small quantities. The syndicate paid to the Italo trustee $3,500,000 and the trustee expended the money on behalf of the Italo company, thereby enabling Italo to meet its cash obligations on property purchase contracts and avoid the loss of these admittedly valuable properties on which payment had already been made. [R. pp. 905-906.] The syndicate fully performed its obligation to the Italo company and received a full release and acquittance from Italo and the trustee on December 20, 1928. [Exhibits 83 and 84; R. p. 917.]

According to the allegations of the indictment [R. p. 33] the government claims that the syndicate was a fraud on Italo and its stockholders because the syndicate members bought 6,000,000 shares (3,000,000 units) of Italo stock for $3,500,000 and wrongfully received profits as members of said syndicate derived from the sale of the 3,000,000 units of stock. *There is no allegation in the indictment that it was part of the scheme to defraud the*

syndicate members and the charge that the syndicate members profited by reason of their participation therein proved false. In fact the syndicate members received back only 52% in cash of their cash investment in the syndicate. [R. pp. 928-9.] Hence the indictment allegation with respect to this matter must resolve itself into an allegation of fraud because the syndicate members expected to derive a profit from their syndicate participation. It must be apparent that since the syndicate was not a fraud on Italo or its stockholders the fact that the syndicate members profited or lost from the syndicate operation would be immaterial. Admittedly the syndicate members expected to profit or they would not have subscribed to the syndicate. There were seventy-two syndicate members of whom fourteen were officers or directors of Italo company and the remainder including Shingle and Brown were not officers and directors of the company.

The syndicate began in June, 1928, and by December 20, 1928, had paid to the Italo trustee $3,500,000 which money was used by the trustee for the benefit of the Italo Company and the relationship between the syndicate and the Italo or Italo trustee was fully terminated on and before December 20, 1928. On December 20, 1928, the syndicate manager received a full and complete release from the Italo and its trustee and an acknowledgment that the syndicate had fully and completely performed its obligations. (Exhibits 83 and 84.) Obviously therefore had the syndicate been a fraud on Italo that fraud must have been committed when the syndicate was formed in June, 1928, and the syndicate agreed to buy the Italo stock, or between that date and December 20, 1928, when the relations between Italo and the syndicate terminated.

By no stretch of the imagination could the alleged fraudulent scheme with respect to the syndicate have extended beyond December 20, 1928, because on that date the relations between Italo and its stockholders and the syndicate were terminated by complete consummation of the syndicate contract.

O. J. Rohde was a member of the syndicate to the extent of a $5,000 subscription and he became such at the solicitation of the defendant Siens. He, of course, like other syndicate members, expected to profit from his syndicate subscription. [R. p. 577.] If the hope of profiting from participation in the syndicate was fraudulent Rohde was as much or as little a party to a scheme to defraud as were these appellants and other syndicate members, who were not fiduciaries of Italo. These two appellants lost thirteen times as much as Rohde, by reason of their syndicate subscription, because they subscribed thirteen times as much thereto.

The foregoing summary of the evidence which appears in the record clearly shows that these appellants were not guilty of being members of a fraudulent scheme, if any there was, and that the court should have granted their motion for an instructed verdict of not guilty. The evidence with respect to them was clearly as consistent with innocence as with guilt, and therefore an instructed verdict of not guilty should have been granted.

Karchner v. U. S., 61 F. (2) 623;

Gold v. U. S., 36 F. (2) 16, 32.

12th Count Letter Not in Furtherance of Fraudulent Scheme.

The twelfth count letter was a letter *mailed* to the witness Rohde, *a syndicate member,* on January 23, 1929, at San Francisco in response to an inquiry from him. [R. pp. 580-581.] The letter related solely to the *syndicate affairs*, that is, the relations *between the syndicate and its members* and had no possible relation with or reference to the Brownmoor deal, the $80,000 loan, or the purchase of the McKeon assets by the Italo, these transactions having long since been consummated. We must remember that the syndicate-Italo relationship terminated December 20, 1928. The twelfth count letter was mailed in San Francisco January 23, 1929, more than a month later. We therefore contend that the letter could not have been for the purpose "of executing" the alleged scheme to defraud.

Belden v. U. S. (C. C. A. 9), 223 Fed. 726, 729.

No citation of authority is necessary for the proposition that in a prosecution under the mail fraud statute, the *first burden* of the government is to prove that the scheme alleged in the indictment is a fraudulent one. Unless the scheme alleged and proven is fraudulent the use of the mails becomes immaterial. If the scheme proven *is not fraudulent no crime results* even though the mails are used. (*Karchmer v. U. S., supra.*) But if the government proves the alleged scheme and proves that it was fraudulent, the proof must then show the participation of each

defendant therein. If the government proves part of the scheme and fails to prove part of it as to a particular defendant, *it must prove that the part that it has established was fraudulent* and that each defendant participated therein, and, *with respect to the use of the mails it must further prove that the letter mailed was for the purpose of executing that part of the scheme which it has proven fraudulent as to each particular defendant,* for if the letter was only in furtherance of the unproved portion of the scheme no conviction could result for lack of a fraudulent scheme.

It is clear from the statute itself that *the mails must have been used during the existence of the fraudulent scheme proved and for the purpose of executing it. (Belden v. U. S., supra.)* If the scheme is divided into parts, such as we have here, and all of these parts were performed before the letter was mailed, no crime results. If parts of the scheme were executed and some parts unexecuted when the mails were used *there must be a clear relation between the executed and unexecuted parts and the letter must have been mailed to execute the unexecuted part.* In this case, therefore, the only possible part of the alleged scheme to which the twelfth count letter could relate is the Big Syndicate which, as above pointed out, completely concluded its relationship with the Italo on or before December 20, 1928.

The law is well settled that the indictment letter must be mailed *during the existence* of the alleged part of the

scheme to defraud to which it relates and be for the purpose of executing it.

Belden v. U. S., supra;
Lonabaugh v. U. S., 179 Fed. 476;
U. S. v. Jones, 10 F. 469;
49 *C. J.* 1212, Sec. 221;
Salinger v. U. S. 23 F. (2) 48;
U. S. v. McLaughlin, 169 F. 305 at 307;
Stewart v. U. S. 119 F. 89 at 95;
Stewart v. U. S. 300 F. 769;
McLendon v. U. S. 2 F. (2) 660.

Therefore the government must here show that the syndicate *was a fraud on Italo, that the letter was mailed while the Italo-Syndicate relations existed, and that the letter was for the purpose of executing the scheme by which the Syndicate was to defraud Italo.*

See cases cited *supra* and
Barnes v. U. S. 25 F. (2) 61;
U. S. v. Ryan, 123 F. 634.

In the case of *Stewart v. United States,* 119 F. 89 (C. C. A. 8), *supra,* the alleged scheme to defraud was that the defendant should induce, by the use of the mails, persons to come to a designated city for the purpose of then defrauding them by betting on races. The letter pleaded in the indictment was mailed *after* one of these persons had been already induced to come to this city and after he had wagered his money and sustained his loss. *The court therefore held that such letter having been mailed after the accomplishment of the alleged scheme*

could not have been for the purpose of executing it and that a conviction could not be sustained.

In *McLendon v. U. S.* (C. C. A. 6) *supra*, the court said

> *"The letter which constitutes the misuse of the mails must be a step in the attempted execution of the scheme charged in the indictment.* . . . and if the letter could have no effect direct or indirect in furthering that scheme even though the particular transaction may be dishonest in some other way, guilt of the crime charged is not made out."

It must follow from the above that the letter pleaded in the twelfth count of the indictment *was not mailed during the existence* of any relations between Italo and the Syndicate and could therefore not have been mailed for the purpose of consummating, or with relation to, any transaction which had already terminated, and therefore the letter was not mailed for the purpose of executing the alleged scheme to defraud and the cause should be reversed with instructions to dismiss.

Conclusion.

The record in this case is so full of prejudicial reversible error that it is difficult to determine which errors should be urged on appeal and which omitted without having a brief of inordinate length. We urge upon the court that it first consider the statement of facts contained in the McKeon brief and then consider the facts as hereinabove set forth with relation to the appellants Shingle and Brown. We adopt herein without further argument the assigned and specified errors argued in the brief of the appellants McKeon and those of the other appellants herein insofar as they apply to appellants Shingle and Brown.

We believe, from the foregoing, that it has been conclusively established that this cause must be reversed as to Shingle and Brown for the following reasons:

1. Because the twelfth count of the indictment *does not allege a public offense* cognizable by the United States District Court for the Southern District of California, and if it does the court failed to instruct the jury on the law with respect thereto.

2. Because *the court erred in admitting evidence against them which should have been excluded by reason of the restrictions contained in the bill of particulars.*

3. Because the court erred *in refusing to instruct the jury* not to consider evidence against these appellants *with respect to transactions that they were excluded in the bill of particulars from having participated in.*

4. Because the court *erred in proceeding with the trial after the filing of a legally sufficient affidavit of personal bias and prejudice.*

5. Because the court erred in *permitting the jury to receive evidence out of court* after it had retired to deliberate verdict.

6. Because the court erred in admitting in evidence books of account and records of corporations, with which these appellants had no connection and of which they had no knowledge, and the prejudicial conclusions and statements of the government accountants based on these records and other records which were not in evidence.

7. Because the court erred in unduly restricting the right of cross-examination.

8. Because the court erred in the instructions given to the jury and refusing to give instructions which correctly stated the law.

9. Because the court erred in admitting evidence of bad reputation before the evidence of good reputation had been admitted, and in permitting the District Attorney to argue upon evidence that had been stricken from the record.

10. Because the evidence was legally insufficient to sustain a verdict and because the letter pleaded in the count upon which appellants were convicted was not a letter mailed or delivered for the purpose of executing the alleged scheme to defraud.

The reversal of this case for insufficiency of the indictment and evidence should be with instructions to dismiss.

Respectfully submitted,

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